Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DONALD R. WILD and DIANA H. ~~WILD,~~

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC.; Y.E.S.! INC. a/k/a YOUTH EMPLOYMENT SERVICES, INC.; KARLEEN HILLERY; CHOAN LANE; JEREMY HOLMES; HEART OF TEXAS DODGE, INC.; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANY; PROGRESSIVE NORTHERN INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; UNIVERSAL UNDERWRITERS INSURANCE COMPANY and MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners filed a personal injury lawsuit against multiple defendants in a federal district court in Louisiana for the death of their son, who was killed in an accident in Wisconsin. The Louisiana judge transferred the case to the federal district court in Wisconsin, pursuant to 28 U.S.C. § 1406(a) but without first determining if all defendants could be sued there. The Wisconsin judge dismissed one defendant having concluded that she was not subject to the Wisconsin court's jurisdiction. Petitioners then moved to retransfer the case to Louisiana arguing that the transfer was unlawful because the transferee court did not have jurisdiction over *all* defendants.

This case presents the following question:

Is a transfer under section 1406(a) invalid because one defendant in a multidefendant case is not subject to the transferee court's personal jurisdiction?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion and order (per Crabb, C.J.) granting various motions for summary judgment (Appendix ("Pet. App.") 20a-52a) is not published. The district court's subsequent order denying petitioners' motion to retransfer the case to the transferor court (Pet. App. 16a-19a) is not published. The court of appeals' opinion (per Posner, J., joined by Flaum, C.J. and Lipez, J.) affirming (Pet. App. la-12a) is published at 292 F.3d 526.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on May 31, 2002. Petitioners did not request rehearing and/or rehearing en banc. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners rely on and this petition involves the proper interpretation of § 1406(a) of the Judicial Code, 28 U.S.C. § 1406(a), which provides:

> The district court of a district in which is filed a case laying venue in the *wrong* division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it *could* have been brought.

STATEMENT OF THE CASE

Petitioners, Donald and Diana Wild, are the parents of Joseph Wild, a young man who was recruited in Louisiana to work as a traveling salesman, selling magazine subscriptions in towns and cities throughout the country. Joseph and several other members of his sales crew were killed in a vehicular accident in Wisconsin, while they were being transported to their hotel after a full day of work.

When petitioners filed a wrongful death action in the Eastern District of Louisiana, one of the defendants, Allstate Insurance Co. ("Allstate"), filed a motion to transfer the case to Wisconsin. The Louisiana judge, acting pursuant to 28 U.S.C. § 1406(a) but without first determining if the case "could have been brought" originally in Wisconsin, granted the motion.

Almost ten months after the transfer, several defendants filed motions for summary judgment, with one defendant, Karleen Hillery ("Hillery"), claiming there was no basis for subjecting her to the Wisconsin court's jurisdiction.

The Wisconsin judge granted all the motions. With respect to Hillery's jurisdictional motion, the Wisconsin judge erroneously placed upon petitioners "the burden of establishing personal jurisdiction over defendant Hillery" (Pet. App. 35a), even though ordinarily, the party who files a motion to transfer under § 1406(a), in this case Aetna, bears that burden. *Chrysler Credit Corp. v. County Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); 17 *Moore's Federal Practice* § 111.33 (3d ed.). The Wisconsin judge concluded that

> . . . petitioners have not shown that defendant Hillery committed any tortious act within Wisconsin or that any other reason exists for subjecting her to personal jurisdiction. Accordingly, she will be dismissed from this case.

Petitioners filed a motion for reconsideration, which was subsequently denied.

However, while their motion for reconsideration was pending, petitioners asked the Wisconsin judge to *retransfer* the case to Louisiana because (1) prior to the transfer to Wisconsin, the Louisiana judge did not consider whether the transferee (Wisconsin) court had jurisdiction over *all* the defendants, as required by *Hoffman v. Blaski*, 363 U.S. 335 (1960) and its progeny, and (2) the Wisconsin judge had decided (on December 6, 2000, when the summary judgment motions were granted) that Hillery was *not* subject to the Wisconsin court's jurisdiction.

Petitioners argued that since the Wisconsin judge had concluded there was no reason for "subjecting [Hillery] to personal jurisdiction" (Pet. App. 35a) in Wisconsin, the Wisconsin court (1) could not exercise jurisdiction over *all* defendants, and (2) the transfer from Louisiana was unlawful because this case "could [not] have been brought" against *all* defendants in Wisconsin, as required by 28 U.S.C. § 1406(a) for a valid transfer. In short, petitioners took the position that Hillery's dismissal for lack of personal jurisdiction had established that the Wisconsin court was *not* a proper transferee court and, as such, never acquired jurisdiction over the case, requiring a retransfer.

The Wisconsin judge, while recognizing that "it does seem somewhat unfair that plaintiffs are now forced to bring a separate suit if they want to pursue Hillery" (Pet. App. 18a), denied petitioners' motion for retransfer. (Pet. App. 16a-19a).[1] The Wisconsin judge apparently believed that a transferee court acquires jurisdiction over a transferred case *even* if it does not have jurisdiction over *all* defendants:

> Just because plaintiffs cannot get personal jurisdiction over all defendants they want to sue does not mean that plaintiffs do not have a *right* to bring suit in a particular district. The fact that this court does not have personal jurisdiction over Hillery does not mean that this court does not have the jurisdiction over the case itself. (Emphasis in the original)

After other motions were granted and following petitioners' settlement with three defendants, the Wisconsin court entered an Amended Judgment. (Pet. App. 13a-15a). On petitioners' appeal, the Seventh Circuit affirmed in an opinion remarkable for its fundamental inconsistency with governing precedent of this Court and decisions of other circuits. (Pet. App. 1a-12a). In that opinion, the Seventh Circuit announced a rule that is completely at odds with the rule applied in *all* the other circuits that have considered this issue:

---

1. Petitioners' motion for retransfer preserved for appellate review the issues concerning the propriety of the original transfer and the validity of any judgment issued by the transferee court. *National Standard Co. v. Adamkus*, 881 F.2d 352, 356 (7th Cir. 1989); *Songbyrd v. Estate of Grossman*, 206 F.3d 172, 177 (2d Cir. 2000).

> But in any event we do not agree with the plaintiffs that a transfer under section 1406(a) (or the closely parallel section 1404(a), which, under the same conditions as section 1406(a), *see Van Dusen v. Barrack*, 376 U.S. 612, 622 and n.13 (1964); *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1104 n.5 (5th Cir. 1981), permits transfers for the convenience of the parties even if venue is proper in the district in which the suit was originally filed) is invalid just because one defendant in a multidefendant case (there were 13 defendants before Hillery was dismissed) cannot be served either directly or under a long-arm statute in the transferee district . . .
>
> A multidefendant case, this multidefendant case in any case, is different . . .
>
> It is a bad result, not contemplated by Congress, and we conclude that there is no absolute bar to the transfer of a multidefendant suit to a district in which one of the defendants cannot be served . . .

(Pet. App. 7a-8a).

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the issue presented in this case is of important concern to the effective administration of justice in the federal courts. The issue is one of statutory construction and about the meaning of 28 U.S.C. § 1406(a), which governs the transfer,

from one district court to another, of cases that are filed in the wrong venue. There is a need for uniform interpretation of this statute.

Second, the Seventh Circuit's decision conflicts with a controlling decision of this Court (which had effectively settled the issue) and with decisions of at least three other circuit courts. This conflict likewise involves an important question of statutory construction and is apt to have continuing future consequences. The writ should be granted to resolve *now* the conflict on this important issue.

ARGUMENT

a. The Wisconsin Court did not acquire jurisdiction over the case.

Motions to transfer cases from one district court to another are governed by 28 U.S.C. §§ 1404(a) and 1406(a). Section 1404(a) applies to a case that is originally filed in the *proper* venue:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer *any* civil action to any other district or division where it *might* have been brought. (Emphasis added)

And Section 1406(a) applies if the case is originally filed in the *wrong* venue:

> The district court of a district in which is filed a case laying venue in the *wrong* division or district shall dismiss, or if it be in the interest of justice,

> transfer such case to any district or division in which it *could* have been brought. (Emphasis added)

Although the two statutes are similar, § 1406(a) uses the word "*could*," while § 1404(a) uses the word "*might*." The phrase "*where it might have been brought*" has been interpreted to mean the same as the phrase "*where it could have been brought.*" *Heinz v. Frank Lloyd Wright Foundation*, 773 F. Supp. 1219 (W.D. Wis. 1991).

The party who requests the transfer of a case from one district to another must establish that personal jurisdiction over *all* defendants can be exercised in the proposed transferee court. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); 17 *Moore's Federal Practice* § 111.33 (3d ed.).

Within the context of § 1404(a), this Court held in *Hoffman v. Blaski*, 363 U.S. 335 (1960) that a case can be transferred *only* to a court where plaintiff would have had a right to bring the action independent of the wishes of the defendant. In *Hoffman*, the plaintiffs

> objected to the transfer [from one district to another] because inasmuch as the defendants did not reside, maintain a place of business, or [commit the wrongful act] in, and could not have been served with process in, the [transferee] district, the courts of [the transferee] district lacked venue over the action and ability to command jurisdiction over the defendants; that therefore [the transferee] district was not a forum in which the [plaintiffs] had a right to bring the

> action, and, hence, the [transferor] court was without power to transfer it to [the transferee] district.

363 U.S. at 336-37.

This Court agreed and explained that a transferee court acquires *jurisdiction* over a *case* only through a valid transfer:

> It is not to be doubted that the transferee courts, like every District Court, had jurisdiction to entertain actions of the character involved, but it is obvious that they did not *acquire jurisdiction* over these particular actions when they were brought in the *transferor* courts. The *transferee* courts could have acquired *jurisdiction* over these actions *only if properly brought in those courts, or if validly transferred thereto under § 1404(a).*

363 U.S. at 343. (Emphasis added)

Thus, ever since this Court decided *Hoffman,* it has been clear that (1) a *proper transfer* to the *proper transferee court* is a *jurisdictional* requirement that must be satisfied before the transferee court acquires jurisdiction over a case, and (2) a case can be validly transferred under § 1404(a), and by analogy under § 1406(a), only to a court that has jurisdiction over *all* defendants.

After this Court decided *Hoffman*, at least three circuit courts read §§ 1404(a) and 1406(a) as requiring that the proposed transferee court have proper venue *and* the ability to assert *personal* jurisdiction over *all* defendants. In *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 24 (3d Cir. 1970) the Third Circuit stated that

> . . . a transfer is authorized by the statute only if the plaintiff had an "unqualified right" to bring the action in the transferee forum at the time of the commencement of the action; i.e., venue must have been proper in the transferee district and the transferee court must have had power to command jurisdiction over *all* of the defendants. *Van Dusen v. Barrack*, supra. Prior to ordering a transfer the district court must make a determination that the suit could have been rightly started in the transferee district. *Jones v. Valley Welding Supply Company*, 303 F. Supp. 9 (W.D.Pa. 1969). If there is a "real question" whether a plaintiff could have commenced the action originally in the transferee forum, *Leyden v. Excello Corporation*, 188 F. Supp. 396 (D.N.J. 1960), it is evident that he could not have an unqualified right to bring his cause in the transferee forum . . . (Emphasis added)

Similarly, in *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228, 1230 (D.C. Cir. 1981), the District of Columbia Circuit stated:

> We are aware that such a transfer [under § 1406(a)] would require the district court to decide as a *preliminary* matter that venue and jurisdiction would be proper as to *all* defendants in the [proposed transferee] district. *Hoffman v. Blaski*, 363 U.S. 335 (1960) (interpreting nearly parallel language of 28 U.S.C. § 1404(a)) . . . (Emphasis added)

Likewise, in *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984), the Fifth Circuit noted

that "[o]rdinarily transfer of a suit against *multiple* defendants is proper *only* if *all of them* would have been amenable to process in, and if venue as to all of them would have been proper in, the transferee court." The Seventh Circuit is the only appellate court that has reached a different conclusion.

All district courts that have considered the issue, except the Wisconsin court in our case, have also concluded that the transferee court must have personal jurisdiction over *all* defendants. *Mizell v. Prism Computer Corp.*, 27 F. Supp. 2d 708, 713 (S.D. Miss. 1998) ("Thus, transfer may properly be made *only* where the court to which transfer is sought would have been a proper venue and would have had personal jurisdiction over *all* the defendants if it had been the original forum"); *Watwood v. Barber*, 70 F.R.D. 1, 9 (N.D. Ga. 1976); *Schacht v. Javits*, 53 F.R.D. 321, 324 (S.D.N.Y. 1971); *Levin v. Mississippi River Corporation*, 289 F. Supp. 353, 357 (S.D.N.Y. 1968); *Alexander & Alexander, Inc. v. Donald F. Muldoon & Co., et al.*, 685 F. Supp. 346 (S.D.N.Y. 1988) (the court must have personal jurisdiction over *all* defendants); *Heinz v. Frank Lloyd Wright Foundation*, 773 F. Supp. 1219 (W.D. Wis. 1991) (Crabb, C. J.) ("The phrase 'could have been brought' in § 1406(a) requires that the proposed transferee court have proper venue and the ability to assert personal jurisdiction over the *defendants*"); *Johnson v. Helicopter & Airplane Services Corp.*, 389 F. Supp. 509 (D. Md. 1974); *Volkswagen de Mexico, S.A. v. Germanischer Lloyd*, 768 F. Supp. 1023 (S.D.N.Y. 1991); 17 Moore's Federal Practice, § 111.33 (3d ed.).

The rule is so well established that one treatise states:

> In suits against multiple defendants, transfer is proper only to a district in which *all* of the

> defendants would have been amenable to process and in which the venue would be proper for all of them. (Emphasis added)

15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3845, p. 351 (2d ed. 1986).

In our case, the Wisconsin court never acquired jurisdiction because one defendant, Hillery, is not amenable to process in Wisconsin. Once the Wisconsin court determined that Hillery could not be sued there, it should have retransferred the case to Louisiana.

b. The appellate court should have applied the law of the Fifth Circuit.

In the Fifth Circuit, "a transfer of a suit against multiple defendants is proper only if all of them would have been amenable to process in, and if venue as to all of them would have been proper in, the transferee court." *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d at 1140, 1148 (5th Cir. 1984).

Without giving any explanation, the Seventh Circuit applied its new rule — that there is no absolute bar to the transfer of a multidefendant suit to a district in which one of the defendants cannot be served — which is contrary to the Fifth Circuit's rule. However, the validity of the transfer, which was ordered by the Louisiana judge, had to be evaluated under the Fifth Circuit's law and not under the Seventh Circuit's law.

c. The Amended Judgment is null and void.

It is well established that a judgment rendered by a court that lacks jurisdiction is a nullity. *Johnson v. Zerbst*, 304 U.S. 458 (1938) (A "judgment of conviction pronounced by a court without jurisdiction is void."); *Long v. Shorebank Development Corp.*, 182 F.3d 548 (7th Cir. 1999) ("A void judgment, 'that is one entered by a court which lacks jurisdiction over the parties, the subject matter, or lacks inherent power to enter the particular judgment . . . can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court.'"); *Farrell v. Wyatt*, 408 F.2d 662, 664 (2d Cir. 1969); *Matter of Reitnauer*, 152 F.3d. 341, 344 n.12 (5th Cir. 1998) ("It is true that (1) jurisdictional defects render a judgment void, and (2) void judgments are subject to collateral attack.").

In our case, the Amended Judgment is null and void because it was rendered by a transferee court that never acquired jurisdiction over the case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MAY 31, 2002

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3406

DONALD R. WILD AND DIANA H. WILD,

Plaintiffs-Appellants,

v.

SUBSCRIPTION PLUS, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 00 C 67 — **Barbara B. Crabb**, *Chief Judge.*

ARGUED APRIL 18, 2002 — DECIDED MAY 31, 2002

Before FLAUM, *Chief Judge*, and HARLINGTON WOOD, JR., and POSNER, *Circuit Judges*.

POSNER, *Circuit Judge*. This is a personal injury suit brought by the parents of a young man killed in an accident in Wisconsin. Federal jurisdiction is based on diversity of citizenship. The suit was filed originally in a federal district court in Louisiana, but the judge there transferred the case

to a federal district court in Wisconsin, pursuant to 28 U.S.C. § 1406(a), because he determined that Louisiana was not a proper venue for suing all — or in fact any — of the defendants. The district judge in Wisconsin denied the plaintiffs' motion to retransfer the case to Louisiana and later granted motions to dismiss or for summary judgment filed by several of the defendants. The other defendants having settled, the district court entered a final judgment terminating the litigation and sparking this appeal. The principal though not only issue is the lawfulness of the transfer from Louisiana to Wisconsin; if as the plaintiffs contend it was unlawful, the motion to retransfer should have been granted.

We note initially a serious deficiency in the jurisdictional statement in the plaintiffs' brief that went unnoticed in the four briefs filed by defendants. With regard to the insurance-company defendants, the allegation of citizenship takes the following form: "Progressive Northern Insurance Company, a citizen of the State of Wisconsin, with its principal place of business in the State of Ohio." (The allegations regarding the other insurance companies are identical except for name and states.) The diversity statute states that a corporation is a citizen of both the state in which it is incorporated and the state in which its principal place of business is located. 28 U.S.C. § 1332(c)(1). If a firm is not a corporation, its citizenship is determined by the citizenship of its proprietor, partners, members, or other principals. *Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990); *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998); *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 316 (7th Cir. 1998); *Herrick Co. v. SCS Communications, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001); *Schiavone Construction Co. v. City of New York*, 99 F.3d

546, 548 (2d Cir. 1996). The plaintiffs' jurisdictional statement does not allege that Progressive Insurance Company or any of the other insurance-company defendants is a corporation — though inquiry of counsel revealed that they are and that the requirement of complete diversity of citizenship is satisfied, with two possible exceptions:

The corporate charter of one of the defendants had been revoked before this suit was brought; and though the charter was later restored, jurisdiction is normally determined as of the date of the filing of the suit. The only case we can find on the precise question, and it happens to be a decision by this court, allows retroactive reinstatement to confer jurisdiction, *Costain Coal Holdings, Inc. v. Resource Investment Corp.*, 15 F.3d 733, 734 and n. 3 (7th Cir. 1994), contrary to (and without discussing) the general principle (an exception is discussed below) that jurisdiction is determined as of the date of the suit; and on that date, before reinstatement, the corporation had no corporate charter.

An approach consistent with the general principle, but which leads to the same result in this case as the approach in *Costain* would, makes the question of what state a corporation is a citizen of if its corporate charter has been revoked depend on the status of such an entity under the law of the state that granted (and later revoked) the charter. Most states sensibly permit a corporation whose charter has been revoked to continue nevertheless to operate as a corporation, specifically for purposes of suing and being sued, until it is actually dissolved. See, e.g., *Paper Systems Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 607-08 (E.D. Wis. 2000); *Clipper Air Cargo, Inc. v. Aviation Products Int'l, Inc.*,

981 F. Supp. 956, 958-59 and n. 3 (D.S.C. 1997); *Illinois Central Gulf R.R. v. Arbox Three Corp.*, 700 F. Supp. 389, 390-91 (N.D. Ill. 1988). Oklahoma, the state of incorporation of the defendant in question (Subscription Plus), is one of those states. 18 Okla. Stat. § 1099; *Polk v. Unknown Trustees, Successors & Assigns of Three-In-One Oil & Gas Co.*, 298 P.2d 432, 435-36 (Okla.1956) (per curiam). And, for icing on the cake, Oklahoma also has a statute making reinstatement of a corporation's charter retroactive. 18 Okla. Stat. § 1120(E). We conclude that the revocation of Subscription Plus's corporate charter did not affect its status for diversity purposes.

The complaint describes another defendant, Mutual Fire and Automobile Insurance Company, as a "foreign insurer authorized to conduct business in Louisiana" — which says nothing about where its principal place of business is (or its state of incorporation, but we have learned that it is Ohio, an answer that does not destroy complete diversity). In the plaintiffs' brief on appeal, Mutual is described as "a citizen of a state other than Louisiana, with its principal place [of business?] in a State other than Louisiana." But how can the plaintiffs know that the company's principal place of business is not in Louisiana if they don't know where its principal place of business is? We doubt that the plaintiffs conducted a census of all businesses whose principal place of business is in Louisiana and discovered that Mutual Fire and Automobile Insurance Company is not one of them. No matter. The company was later dropped as a party, and under *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989), a want of complete diversity can be cured by dropping the party that made diversity incomplete.

Appendix A

With subject-matter jurisdiction secure, we turn to the transfer issue and the merits, first sketching in the factual background.

Subscription Plus, owned and operated by a woman named Karleen Hillery, is engaged in the business of processing magazine subscriptions. It contracted with Y.E.S.!, a sales agency, to secure magazine subscriptions for Subscription Plus. The Wilds' son Joseph was a salesman employed by Y.E.S.! The Wilds live in Louisiana, and Joseph Wild was hired there.

The salesmen would travel in groups in vans to various states to sell subscriptions. Y.E.S.!'s owner, Lane, bought a green van and employed a man named Holmes to drive it. (The color turns out to be relevant, as we'll see later but can ignore for now.) While driving the sales crew in Wisconsin after a day of door-to-door subscription selling, Holmes, noticing that he was being pursued by a police car and not having a valid driver's license, tried to switch seats with one of the passengers, lost control, and crashed the van. Seven members of the sales crew, including young Wild, were killed and the others injured. Suits were brought on behalf of all the victims except Wild in a Wisconsin state court, where the suits were consolidated and are pending. Besides suing Hillery, Lane, Holmes, Subscription Plus, Y.E.S.! and the dealership that sold the van, the Wilds sued the liability insurers of these defendants; it could do this because Louisiana, like Wisconsin, is a direct-action state, meaning that a tort plaintiff can sue his injurer's liability insurer as well as the injurer.

Appendix A

Section 1406(a) of the Judicial Code provides that if a suit is brought in a district that is not a proper venue under 28 U.S.C. § 1391, the judge can transfer it to any district "in which it could have been brought." The district judge in Louisiana found that venue in this diversity suit was not properly laid in Louisiana because none of the defendants resided there or could be served there (or elsewhere under Louisiana's long-arm statute) and "a substantial part of the events or omissions giving rise to the claim" had not taken place there either. 28 U.S.C. § 1391(a)(2). There is no serious contention that the judge erred in this ruling or that the Western District of Wisconsin is not a district in which venue can be laid, at least with regard to most of the defendants (and possibly all, as we're about to see). The accident occurred there, and it is clearly the most convenient site for the litigation. All the other suits growing out of the accident have been consolidated there, and while there is no procedure for consolidating those suits with the Wilds' suit because those suits are in state court and the Wilds' suit is in federal court, at least the defendants — who are the same in all the suits, including the Wilds' suit — can localize their defense efforts to one state, minimizing travel time for their lawyers.

The only basis for the motion to retransfer the case was that the district judge had ruled that Hillery could not be served under Wisconsin's long-arm statute, thus forcing the Wilds, unless the case was retransferred, to split their suit between Wisconsin (all the defendants except Hillery) and Louisiana (Hillery). After the judge ruled, the Wilds did bring a suit against Hillery in Louisiana, but it was promptly transferred to Wisconsin (and is pending before the same district judge), because in the interim a Wisconsin state court ruling in one of the cases arising from the accident interpreted

Wisconsin's long-arm statute in a way that makes clear that Hillery is within the statute's reach after all. *Forgues v. Heart of Texas Dodge, Inc.*, No. 99CV0952, slip op. at 2 (Wis. Cir. Ct. Nov. 5, 2001). Although an unpublished opinion of a trial court, and so hardly an authoritative guide to the law of Wisconsin, the parties do not question its soundness.

It is very difficult in these unusual circumstances to get excited about the prospect of bouncing this three-year-old case back to Louisiana, but cf. *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 24 (3d Cir.1970), even apart from the fact that, since venue cannot be laid in Louisiana, the case would have to be dismissed or transferred elsewhere. Supposing the district judge had gotten Wisconsin law right when she ruled on Hillery's motion to dismiss for want of personal jurisdiction (that is, supposing she had anticipated the decision in *Forgues*), Hillery would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscription Plus, would have gone down the drain with that claim. As it is, the claim against her remains alive in the district court — if barely, since the defendants have moved to dismiss it as barred by res judicata. Still, the plaintiffs are no worse off, or, in any practical sense, differently situated, than if the district judge had not mistakenly dismissed Hillery, thus raising the retransfer issue.

But in any event we do not agree with the plaintiffs that a transfer under section 1406(a) (or the closely parallel section 1404(a), which, under the same conditions as section 1406(a), see *Van Dusen v. Barrack*, 376 U.S. 612, 622 and n. 13 (1964); *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1104 n. 5 (5th Cir. 1981), permits transfers for the convenience of the parties even if venue is proper in the

district in which the suit was originally filed) is invalid just because one defendant in a multidefendant case (there were 13 defendants before Hillery was dismissed) cannot be served either directly or under a long-arm statute in the transferee district. Were there only one defendant and he or she could not be served there, it would be plain that the suit "could not be brought" there and so transfer would be improper. *Van Dusen v. Barrack*, *supra*, 376 U.S. at 621; *Ellis v. Great Southwestern Corp.*, *supra*, 646 F.2d at 1107; 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3827, pp. 274-75 and n. 30 (2d ed. 1986). For consider the implications: *A* sues *B* in a district in which venue is improper, meaning (among other things) that *B* does not reside and cannot be served there, and the court transfers the case to *another* district in which *B* does not reside (in which event *B* could be served) and cannot otherwise be served; it would be absurd to permit such a transfer. The suit should instead be dismissed and *A* forced to sue *B* somewhere *B* can be served.

A multidefendant case, this multidefendant case in any case, is different. The 13 defendants are scattered all over the United States. There is (or so the district judge believed when she denied the retransfer back to Louisiana) no federal district in which all could be served. If the case could not have been transferred from Louisiana to Wisconsin, it could not have been transferred anywhere, which means it would have had to be dismissed in its entirety because Louisiana was not a proper venue for any of the defendants, and the Wilds forced to sue maybe in 13 different districts or states. This result would be contrary to the purpose of section 1406(a), which introduced transfer as an alternative to dismissal. As the Supreme Court explained in *Goldlawr, Inc.*

v. Heiman, 369 U.S. 463, 466 (1962), "the problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations. . . . The language and history of § 1406(a) . . . show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice." That is the result for which the Wilds (paradoxically and opportunistically, since they are the plaintiffs) contend.

It is a bad result, not contemplated by Congress; and we conclude that there is no absolute bar to the transfer of a multidefendant suit to a district in which one of the defendants cannot be served. But that leaves the question whether a defendant in a multidefendant suit who cannot be served can be forced to defend in the transferee district or, as most cases hold, must be severed from the rest of the suit and the suit against him either dismissed or (better, to avoid the running of the statute of limitations) transferred back to the district in which the suit was first filed or to a district in which service upon him is possible. *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984); *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228, 1230 (D.C.Cir. 1981) (per curiam); *Relf v. Gasch*, 511 F.2d 804, 807-08 and n. 13 (D.C. Cir. 1975); *Shutte v. Armco Steel Corp.*, *supra*, 431 F.2d at 24; 15 Wright, Miller & Cooper, *supra*, § 3845, pp. 351-53 (2d ed. 1986 & 2002

Supp.). The argument for the latter course, nowhere made in the notably sparse discussions in the cases, is that the transfer statutes do not purport to alter the rules governing personal jurisdiction; and of course the outer bounds of those rules are set by the Constitution. At all events, by dismissing Hillery from the suit, the district judge did what the case law permits.

We move on to the merits, where we can be brief. The non-settling defendants are Subscription Plus, the dealership that sold the van to Lane, and several of the insurance companies. Since Y.E.S.! was an independent contractor of Subscription Plus, the Wilds could not impute the negligence (or worse) of Holmes, Y.E.S.!'s employee, to Subscription Plus. *Wagner v. Continental Casualty Co.*, 421 N.W.2d 835, 844 (Wis. 1988); *Snider v. Northern States Power Co.*, 260 N.W.2d 260, 261 (Wis. 1977); *Giffin v. Poetzl*, 634 N.W.2d 901, 905 (Wis. App. 2001); *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991). There are a number of exceptions to the rule that a principal is not liable for the torts of his independent contractors, but, as explained at length by the district judge, none of them is applicable to this case. And anyway if Holmes had been an employee of Subscription Plus, he would be subject to Wisconsin's workers' compensation law, which preempts tort claims by employees against their employers.

The claim against the dealership is completely frivolous. Lane when he bought the van showed the dealer a valid driver's license and proof of insurance. The dealer had no reason to think Lane would entrust the van to a person who did not have a valid driver's license and was reckless; and so no negligence can be attributed to the dealer. *Bankert*

by Habush v. Threshermen's Mutual Ins. Co., 329 N.W.2d 150, 153 (Wis. 1983); *Halverson by Boles v. Halverson*, 541 N.W.2d 150, 153 (Wis. App. 1995); *Joyce v. Joyce*, 975 F.2d 379, 385 (7th Cir. 1992).

That leaves only the insurance companies. Two of them, Acceptance and Scottsdale, were the liability insurers of Subscription Plus and of Hillery, respectively. Wisconsin permits a direct action regardless of whether the insured is a party, but only if the insurance policy was issued or delivered in Wisconsin, *Kenison v. Wellington Ins. Co.*, 582 N.W.2d 69, 73 (Wis. App. 1998); *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1092 (7th Cir. 1999) (Wisconsin law), which neither of these policies was. Otherwise the direct action can be maintained only if and so long as the insureds remain parties. See Wis. Stat. §§ 631.01(1), 632.24; *Kenison v. Wellington Ins. Co.*, *supra*, 582 N.W.2d at 73. Both Subscription Plus and Hillery were properly dismissed, and out with them went their two insurers.

Progressive was Lane's insurer; Lane, remember, owned the van that crashed as well as owning and controlling Y.E.S.!, which operated the van. But here is where color becomes significant. The van was green; but the policy was written to cover a white van that had been purchased earlier but was out of service. The green van was bought in January 1999; the policy on the white van became effective on March 5; and the accident occurred on March 25. The policy provides coverage for replacement vehicles but only "for a period of not greater than 30 days without notification to us." The purpose is to enable the policy holder to obtain coverage without having to buy a separate policy while enabling the insurance company to adjust the premium retroactively to reflect any

greater risk created by the substitution. *Lewis v. Bradley*, 97 N.W.2d 408, 411 (Wis. 1959); *Rabatie v. U.S. Security Ins. Co.*, 581 So.2d 1327, 1329-30 (Fla.App.1989) (en banc) (per curiam). The plaintiffs argue that the 30 days did not begin to run until March 5, even though the replacement vehicle had been in service for more than a month before then. We think that either the green van was never covered, either because it was acquired before the policy took effect, see *United Farm Bureau Mutual Ins. Co. v. Elder*, 427 N.E.2d 127, 129 (Ill. 1981); *Patrick v. Thines*, 590 N.E.2d 850, 852 (Ohio App. 1990); cf. *Offerdahl v. Glasser*, 93 N.W.2d 362, 363 (Wis. 1959), or because it was in service for more than 30 days without notification to the company; or that, at the very least, notification was due at the time the policy took effect. An insurance company does not want to insure indefinitely a vehicle of which it has no knowledge whatever.

The deficiency in the parties' jurisdictional statements is inexcusable, just as in *Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co.*, 260 F.3d 742, 747-48 (7th Cir. 2001), where we reprimanded the lawyers for both sides. As in that case, so in this one, the lawyers disregarded an utterly clear jurisdictional provision, here regarding the citizenship of corporations, and are hereby reprimanded.

AFFIRMED.

A true Copy:
Teste:

s/
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED AUGUST 20, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

AMENDED
JUDGMENT IN A CIVIL CASE

Case No.: 00-C-67-C

DONALD R. WILD and DIANA H. WILD,

Plaintiff(s),

vs.,

SUBSCRIPTIONS PLUS, INC., Y.E.S.! INC., YOUTH EMPLOYMENT SERVICES, INC., KARLEEN HILLERY, CHOAN A. LANE, JEREMY HOLMES, HEART OF TEXAS DODGE, INC., SCOTTSDALE INSURANCE COMPANY, ACCEPTANCE INSURANCE COMPANIES, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, and UNIVERSAL UNDERWRITERS OF TEXAS,

Defendant(s).

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

Appendix B

IT IS ORDERED AND ADJUDGED

that the motions for summary judgment filed by defendants Karleen Hillery, Heart of Texas Dodge, Inc. and Universal Underwriters of Texas are GRANTED and they are dismissed from the case. The motion for summary judgment filed by defendant Subscriptions Plus is GRANTED with respect to plaintiffs' breach of agreement and negligence claims against this defendant.

IT IS ORDERED AND ADJUDGED that defendant Acceptance Insurance Companies' motion for summary judgment is DENIED as moot because plaintiffs have no viable claims against this defendant's insureds, and the motion of Scottsdale Insurance Company to dismiss the complaint as to it is GRANTED.

IT IS ORDERED AND ADJUDGED that the motion for summary judgment of defendant Progressive Northern Insurance Company is GRANTED and Progressive Northern is relieved of its duty to defend and indemnify defendants Subscription Plus and Karleen Hillery.

IT IS ORDERED AND ADJUDGED that any and all claims asserted by plaintiffs Donald R. Wild and Diana H. Wild against defendants Choan A. Lane and Jeremy Holmes are hereby DISMISSED without taxation of costs and without prejudice and any and all claims asserted by plaintiffs Donald R. Wild and Diana A. Wild against defendant Allstate Insurance Company are hereby DISMISSED with prejudice and without taxation of costs.

Appendix B

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' motion for default judgment against defendant Y.E.S. Inc. is GRANTED. Default judgment is entered in favor of plaintiffs jointly and against defendant Y.E.S., Inc., in the amount of $350,000.00 and this case is CLOSED.

Approved as to form this this 17th day of August, 2001.

s/ Barbara B. Crabb
BARBARA B. CRABB,
U.S. DISTRICT JUDGE

s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk of Court

AUG 20, 2001
Date

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED JANUARY 10, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ORDER
00-C-0067-C

DONALD R. WILD and DIANA H. WILD,

Plaintiffs,

v.

Y.E.S.!, INC., YOUTH EMPLOYMENT SERVICES, INC., CHOAN LANE, JEREMY HOLMES, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, and ALLSTATE INSURANCE COMPANY,

Defendants.

On January 5, 2000, plaintiffs filed a motion to remand or transfer this case to the Eastern District of Louisiana on the ground that this court lacked jurisdiction to continue to hear the case. Plaintiffs assert that because this court does not have personal jurisdiction over defendant Hillery, it cannot be considered a district in which the case "could have been brought." Plaintiffs contend that this case was transferred improperly under 28 U.S.C. § 1406(a). Because I find that this court does have jurisdiction over the case, I will deny plaintiffs' motion.

Appendix C

Plaintiffs rely heavily on *Hoffman v. Blaski*, 363 U. S. 335 (1960), a case in which the Supreme Court construed the 28 U.S.C. § 1404(a) phrase "might have been brought" to mean a district where the plaintiff could have commenced an action at the outset, independently of the wishes of the defendant. *See id.* at 343-44. Although the *Hoffman* court discusses the language of § 1404 (a) and not of § 1406(a), the two phrases "might have been brought" and "could have been brought" have the same meaning. *See Heinz v. Frank Lloyd Wright Foundation*, 773 F.Supp. 1219, 1225 (W.D. Wis. 1991). In *Hoffman*, the Supreme Court held that two Seventh Circuit district courts did not properly transfer cases to other districts under § 1404(a) because the plaintiffs did not have the *right* to bring the cases in the transferee districts. *See Hoffman*, 363 U.S. at 344. In both of the underlying cases, venue did not lie in the transferee courts. Although the defendants, who had moved for the transfers, had waived venue in both cases, the Supreme Court held that the plaintiffs would not have had the right to commence their actions in the transferee districts. *See id.* Therefore, the cases should not have been transferred there.

Plaintiffs rely also on *Heinz*, 773 F.Supp. 1219, a case from this court for the proposition that the transferee court must have personal jurisdiction over the defendants. This case is distinguishable from *Heinz*. Although plaintiffs quote helpful language from *Heinz*, in that case there was only one defendant, so transferring the case to a district that did not have personal jurisdiction over the defendant would have had the effect of dismissing the claim. In this case, several defendants remain subject to suit. In addition, *Heinz* involved the consolidation of two related cases. This court determined

that it was in the "interest of justice" to transfer both cases to the same district because such a transfer would enhance the efficient administration of the federal court system. *See id.* at 1225. Such factors include "ensuring a speedy trial, trying related cases together, and having the trial before a judge who is familiar with the law." *Id.* The factors cited in *Heinz* reinforce the conclusion that this case was transferred properly to this district.

Although it does seem somewhat unfair that plaintiffs are now forced to bring a separate suit if they want to pursue Hillery, plaintiffs' motion must fail. First, this court has jurisdiction over this action. Unlike in *Hoffman*, plaintiffs had the right to bring the suit in this district at the outset: subject matter jurisdiction is present, personal jurisdiction exists over some defendants and venue is proper. Just because plaintiffs cannot get personal jurisdiction over all defendants they want to sue does not mean that plaintiffs do not have a *right* to bring suit in a particular district. The fact that this court does not have personal jurisdiction over Hillery does not mean that this court does not have jurisdiction over the case itself.

Moreover, plaintiffs have not alleged that personal jurisdiction over Hillery exists in the Eastern District of Louisiana, the transferor court. Therefore, even if plaintiffs were correct that the Western District of Wisconsin is not a district in which this suit could have been brought, they have failed to demonstrate that a remand or transfer to Louisiana would enable them to sue all defendants in one district.

Second, §§ 1404(a) and 1406(a) allow for transfers "in the interest of justice." It is in the interest of justice not to transfer this case back to Louisiana. Multiple civil and criminal cases arising from the accident at issue are being tried in this district and in local state court. Grouping all of the related cases in one geographical area allows the parties involved in multiple lawsuits to prepare their cases efficiently. Also, the transfer enhances the efficient administration of the federal court system. Because this court has before it a similar case arising from the same accident, denying the transfer to Louisiana allows related cases to be tried together before a judge who is familiar with the facts and the law. *See id.* Transferring the case back to Louisiana would further undermine the interests of justice because doing so would greatly delay the trial. Finally, plaintiffs have not lost the ability to bring suit against defendants whom this court has dismissed. Nothing prevents plaintiffs from filing suit against those defendants in a district where personal jurisdiction exists.

ORDER

IT IS ORDERED that the motion of Donald R. Wild and Diana H. Wild to remand or transfer the case back to the Eastern District of Louisiana is DENIED.

Entered this 10th day of January, 2001.

BY THE COURT:

s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED DECEMBER 6, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

OPINION AND ORDER

00-C-67-C

DONALD R. WILD and DIANA H. WILD,

Plaintiffs,

v.

SUBSCRIPTIONS PLUS, INC., Y.E.S:! INC., YOUTH EMPLOYMENT SERVICES, INC., KARLEEN HILLERY, CHOAN A. LANE, JEREMY HOLMES, HEART OF TEXAS DODGE, INC., SCOTTSDALE INSURANCE COMPANY, ACCEPTANCE INSURANCE COMPANIES, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, and UNIVERSAL UNDERWRITERS OF TEXAS,[1]

Defendants.

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1. Originally, plaintiffs sued Universal Underwriters Insurance Company. The proper defendant is actually Universal Underwriters of Texas, which issued one of the insurance contracts in dispute. I have amended the caption accordingly.

Appendix D

In this civil action for monetary relief, plaintiffs Donald R. Wild and Diana H. Wild contend that the negligence of each of the defendants caused the death of their son Joseph in a van crash on March 25, 1999. Jurisdiction is present under § 1332, diversity of citizenship. Presently before the court are three motions for summary judgment filed by the following defendants: (1) Subscription Plus, Inc. and Karleen Hillery; (2) Acceptance Insurance Companies; and (3) Heart of Texas Dodge, Inc. and Universal Underwriters of Texas.

Defendant Hillery contends that Wisconsin does not have personal jurisdiction over her and therefore she must be dismissed from this case. In addition, both she and defendant Subscription Plus assert that each of plaintiffs' claims against them fails as a matter of law. Defendant Acceptance argues that its policy does not provide coverage for injuries arising from the accident. Finally, defendants Heart of Texas and Universal argue both that Universal's insurance policy does not cover that accident and that as a matter of law Heart of Texas cannot be held liable for Joseph Wild's death.

The motions for summary judgment filed by defendants Hillery, Subscriptions Plus, Heart of Texas and Universal will be granted. First, plaintiffs have failed to show that this court can exercise personal jurisdiction over defendant Hillery. Furthermore, the parties' proposed findings of fact raise no issue of fact from which a reasonable jury could find in favor of plaintiffs on their claims against defendants Subscriptions Plus, Hillery, Heart of Texas and Universal. As an insurer of Subscriptions Plus and Hillery, defendant Acceptance could be liable only to the extent Subscriptions Plus and Hillery were found liable. With the dismissal of the

negligence claims against these defendants, Acceptance's motion for summary judgment will be denied as moot. However, defendant Subscriptions Plus will not be dismissed from the case in all respects because defendant Progressive Northern Insurance Company has filed a cross claim against defendant Subscriptions Plus requesting declaratory relief regarding its duty to defend.

Before I set forth the undisputed facts, a word is required regarding their source. In an order dated September 19, 2000, dkt. #47, at 2, the parties were advised that responses to motions for summary judgment were to be "filed and served" by October 23, 2000.

Because many extensions had been granted previously, the order further stated, "No further extensions of the summary judgment deadline will be granted for any party for any reason."

Plaintiffs failed to file either a brief or proposed findings of fact before the order's October 23 deadline in response to the three summary judgment motions that were filed. There is no excuse for plaintiffs' untimeliness. They were well aware of the deadline and were quick to make sure deadlines were strictly enforced against other parties. Earlier in October, plaintiffs brought a successful motion to strike defendant Progressive's motion for summary judgment when it was filed several days after the October 2 deadline.

It is disingenuous for plaintiffs to say that they "erroneously believed" only service (rather than service *and* filing) was required by October 23. The September 19 order stated

explicitly that both service and filing were required. Furthermore, in urging the court to strike defendant Progressive's motion, plaintiffs argued that the motion should be stricken because it had been *filed* (not served) after the deadline, demonstrating that plaintiffs were aware that both were required. Regardless, I rejected defendant Progressive's argument that it should have been excused for untimeliness because it was confused about the deadline. I cannot hold one party strictly accountable for deadlines and excuse others. Accordingly, both plaintiffs' briefs and proposed findings of fact in opposition to the various motions for summary judgment will be stricken.[2] (As a practical matter, this ruling makes little difference to the outcome of the motions. In many instances, plaintiffs' responses to the moving defendants' proposed facts are inadequate to put the proposed facts in dispute even if they had been considered.)

Under this court's procedures, unless the non-movant places a factual proposition of the movant into dispute, the court will conclude that there is no genuine issue as to the

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2. Just as this opinion was about to be released, I received a letter from defendant Acceptance Insurance Companies stating that it was withdrawing its motion to strike plaintiffs' brief for being untimely. Defendant Acceptance's motion was filed over a month ago and Acceptance has indicated no reason why it wishes to withdraw it now. Therefore, defendant Acceptance's eleventh hour withdrawal will be disregarded. Furthermore, regardless whether defendant Acceptance is moving to strike plaintiffs' submissions (and I note that it asked to withdraw its motion to strike plaintiffs' brief only, suggesting it wished to maintain its motion to strike plaintiffs' proposed findings of fact), those submissions were untimely nonetheless. Even if defendant Acceptance's withdrawal was to be considered, then, plaintiffs' submissions would still be stricken.

finding of fact proposed initially by the movant. Therefore, except to the extent that proposed findings of defendants were put into dispute by another defendant, all properly supported findings of fact proposed by defendants will be accepted as true for the purpose of deciding the motions for summary judgment.

From the parties' proposed findings of fact, I find the following facts are undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiffs Diana H. Wild and Donald R. Wild are citizens of Louisiana and are the parents of Joseph Wild, who was killed in a van accident on March 25, 1999. Defendant Subscriptions Plus, Inc. is an Oklahoma corporation that was in the business of operating a clearing and processing company for magazine subscriptions. Defendant Karleen Hillery is a citizen of Illinois and the owner and president of Subscriptions Plus. Defendants Scottsdale Insurance Company provided commercial general liability insurance to defendants Hillery and Subscriptions Plus. Defendant Acceptance Insurance Companies provided excess insurance to these defendants and defendant Progressive Northern Insurance Company provided them auto insurance. Defendant Scottsdale is an Ohio corporation; defendant Acceptance is a Nebraska corporation; and defendant Progressive is a Wisconsin corporation.

Appendix D

Defendant Y.E.S.! Inc., or Youth Employment Services, was one of ten or eleven sales crews in 1999 throughout the country that sold the magazine subscriptions processed by Subscriptions Plus. Defendant Choan Lane, a citizen of Iowa, was the manager of Y.E.S.! Inc. Joseph Wild was a salesperson in the Y.E.S. crew.

Defendant Heart of Texas Dodge, Inc. is a Texas corporation engaged in the business of selling motor vehicles in the State of Texas. Defendant Universal Underwriters of Texas is a Texas corporation that issued an insurance policy to Heart of Texas.

B. *Relationship of Subscriptions Plus, Inc., Karleen Hillery, Y.E.S.! Inc., Choan Lane, and Joseph Wild*

1. *Subscription Plus/Karleen Hillery's relationship with Choan Lane/Y.E.S.!, Inc.*

On January 1, 1998, defendant Y.E.S./Lane and Subscriptions Plus signed a contract with each other titled "Independent Distributor Agreement." Under the agreement, which was in effect at the time of the accident, defendant Y.E.S./Lane was to "solicit and secure" magazine subscription orders for defendant Subscriptions Plus. Defendant Y.E.S./Lane was to receive 50% of each magazine order submitted. From his share of the order, defendant Lane paid for his own expenses as well as for the compensation of his sales crew.

Periodically, using defendant Subscriptions Plus's Federal Express account, defendant Lane would send the orders back to defendant Subscriptions Plus along with any checks he received.

Appendix D

The agreement provided that the relationship between defendants Subscriptions Plus and Y.E.S./Lane would be that of an "independent contractor." Further, the agreement provided:

> DISTRIBUTOR IS ENGAGED IN AN INDEPENDENT BUSINESS, AND IS SOLELY RESPONSIBLE FOR THE OPERATION AND CONDUCT OF AGENTS, CONTRACTORS, SOLICITORS, OR REPRESENTATIVES. SUB. PLUS HAS NO RIGHT OR AUTHORITY TO DIRECT, CONTROL, OR OTHERWISE INTERFERE WITH DISTRIBUTOR'S BUSINESS, AND SHALL NOT PROVIDE A BUSINESS PREMISES OR PLACE FOR DISTRIBUTOR TO CONDUCT BUSINESS. DISTRIBUTOR IS FREE TO (A) ESTABLISH ITS OWN SALES METHODS; (B) OBTAIN SALES LEADS IN ANY LAWFUL MANNER; (C) SELECT ITS OWN CUSTOMERS; (D) ESTABLISH A BUSINESS PREMISES UNDER ANY TRADE NAME; (E) CONDUCT BUSINESS FROM ANY LOCATION, AND; (F) DISTRIBUTOR SHALL BE SOLE [sic] RESPONSIBLE FOR ALL ITS OWN EXPENSES, INCLUDING LICENSE FEES, TAXES, AND COMMISSIONS, BONUSES, OR OTHER REMUNERATION PAYABLE TO DISTRIBUTOR'S EMPLOYEES, AGENTS, CONTRACTORS, SOLICITORS, OR REPRESENTATIVES.

Appendix D

Although the agreement permitted defendant Y.E.S./Lane to choose where in the United States it would sell magazine subscriptions, once a week defendant Lane would call defendant Subscriptions Plus collect to inform it of his crew's location.

The agreement could be terminated by either party at any time and defendant Y.E.S./Lane could choose to have its magazine orders processed by another company. After defendant Subscriptions Plus terminated its agreement with defendant Y.E.S./Lane in May 1999, Lane's business processed its magazines through someone else.

Under the terms of the agreement, defendant Subscriptions Plus retained some control over defendant Y.E.S./Lane. For instance, the agreement stated several terms and conditions with which magazine orders had to comply before defendant Subscriptions Plus would accept them, including that they "be evidenced by written agreement," that they comply with the law and that they be completely and accurately filled out. The agreement directed defendant Y.E.S./Lane more generally "to comply with all present and future laws" and "not to engage in any unfair trade or selling practice, to make no false or misleading presentation, and to deal honestly and fairly with the public." In accordance with this provision, defendant Subscriptions Plus would not clear an order if the distributor was violating the law and it told independent distributors not to hire anyone under the age of eighteen. In addition, defendant Subscriptions Plus expected distributors to follow the code of ethics of the National Field Selling Association, a non-profit organization for sales.

Appendix D

Some of the "day-to-day business practices" of the agreement varied from the express terms of the independent distributor agreement. For instance, defendant Subscriptions Plus provided several services to defendant Y.E.S./Lane and its other distributors that were not provided for in the agreement. One of these involved paying the distributors' personal debts. When defendant Y.E.S./Lane sent the checks that new subscribers had written back to defendant Subscriptions Plus, Subscriptions Plus would calculate how much was owed by defendant Y.E.S./Lane. If the amount of checks was worth more than what was owed, defendant Subscriptions Plus would record the excess amount and credit it to defendant Y.E.S./Lane. If requested by defendant Lane or another distributor, defendant Subscriptions Plus would use the money credited to pay bills for the distributor. Sometimes defendant Subscriptions Plus would do this even if the distributor had nothing credited to him at the time, letting the distributor work off the balance later.

Defendant Subscriptions Plus allowed defendant Lane to have his mail sent to defendant Subscriptions Plus, which would forward it to him.

The express terms of the independent distributor agreement were not always followed, at least in defendant Y.E.S./Lane's case. Although defendant Y.E.S./Lane's agreement with defendant Subscriptions Plus provides that Y.E.S./Lane would receive 50% of the sales that it made, it actually received 35% or less as the result of a verbal agreement.

Appendix D

Defendant Y.E.S./Lane used the name Subscriptions Plus in a number of circumstances. When signing into motels with the sales crew, defendant Lane would sign in as "Y.E.S./Subs. Plus" or "Subscriptions Plus, Inc." This may not have been authorized by defendant Subscriptions Plus. Also, when defendant Lane obtained the van from defendant Heart of Texas Dodge, Inc., he wrote that he was employed by both Y.E.S. and Subscriptions Plus.

2. *Subscription Plus's contacts with Joseph Wild and the sales crew*

Defendant Subscriptions Plus maintained a website that included information on becoming a magazine salesperson. Those interested could send information to defendant Subscriptions Plus via the internet. Generally, when defendant Subscriptions Plus received this information, it forwarded the information to the distributor nearest to the location of the applicant.

No members of the sales crew received any tax document from defendant Subscriptions Plus. Defendant Subscriptions Plus imposed no sales quotas on the salespeople. However, defendant Subscriptions Plus kept records of each salesperson's sales performance. When defendant Lane sent subscription orders to defendant Subscriptions Plus, he included the names of the salespeople and the number of sales. In addition, defendant Subscriptions Plus published a newsletter that it distributed to each of the sales crews in which it identified the standing of each salesperson and top sellers for each crew.

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The newsletter contained a list of "points" that each salesperson had accumulated as part of an incentive program for salespeople that promised prizes such as trips for salespeople having the most points. Defendant Subscriptions Plus would dock points from salespeople when their order forms did not conform to its procedures. For example, it would dock points if the orders had been altered, if they were illegible or had an incomplete address. The newsletter advised salespeople that if they altered checks, they could face "[t]ermination/possible arrest."

Subscriptions Plus did not provide any tools or supplies to the salespeople. However, defendant Subscriptions Plus's name and address appeared on the sales forms that the salespeople used to take orders. The receipt that salespeople gave to customers listed a name and phone number only for defendant Subscriptions Plus. Finally, salespeople were authorized to sell only those magazines listed by Subscriptions Plus and only at the prices that defendant Lane gave them.

Like the distributors, members of the sales crew could use defendant Subscriptions Plus as an address where their mail could be sent. Defendant Subscriptions Plus would then forward the mail to defendant Lane, who would distribute the mail.

Two members of the Y.E.S. salescrew, Devann Stehm and Kaila Gillock, believed their employer to be defendant Subscriptions Plus and thought that defendant Hillery was their boss. Although there is no indication that distributors complied with defendant Hillery's requests or believed they had to, defendant Hillery would tell distributors to "get rid of" salespeople that were not selling up to expectations.

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3. *Relationship of Joseph Wild and the sales crew with Y.E.S.! Inc./Choan Lane*

Each of the Y.E.S. salespeople was selected by defendant Y.E.S./Lane. Defendant Holmes sometimes did the interviewing and hiring. Some members of the Y.E.S. crew had signed independent contractor agreements with defendant Y.E.S., but some of the salespeople had no written employment agreements of any kind. Whether or not there was a written agreement does not appear to have affected the actual relationship between defendant Y.E.S./Lane and a salesperson.

Defendant Lane determined where in the United States the crew would sell and how long the crew would remain in a particular location. On at least one occasion in January 1999, the Y.E.S. sales crew traveled with Ultimate Power, another group selling magazines that were processed by Subscriptions Plus.

Defendant Lane decided each day the area where the crew would sell; salespeople had no input into this decision. The driver would drop each salesperson off at a specific location for about two hours, after which the driver would take the salesperson to a new location. This process was repeated until the end of the work day. At the end of the day, salespeople gave defendant Lane all the cash and checks they had collected, along with the sales receipts from that day. The crew would then travel to a motel, where defendant Lane would obtain rooms, which he assigned to the salespeople. Although defendant Lane obtained and signed for the motel rooms, he would debit the salespeople's accounts for this charge.

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Defendant Y.E.S./Lane imposed sales quotas on the salespeople. Each salesperson had a quota of seven subscriptions a day. These were discussed each day at a morning meeting led by defendant Lane.

Transportation was paid for and provided by defendant Y. E.S./Lane at no charge to the salespeople. Defendant Lane selected and hired defendant Jeremy Holmes as the van driver, and paid him one dollar for every order sold. Defendant Lane also assigned each salesperson to a particular vehicle and a particular seat in the vehicle for the day.

Defendant Lane decided what percentage of each sale would be credited to the salespeople. However, sales people were not paid every day. Instead, defendant Lane would keep a record of each person's sales and pay him or her periodically.

C. *The Van*

On January 16, 1999, defendant Heart of Texas, Dodge, Inc. entered into a Conditional Sale and Delivery Agreement with defendant Lane in regard to a 1998 Dodge Ram 3500. Lane presented a valid driver's license from the State of Iowa as well as a proof of insurance card from Allstate Indemnity Company. Defendant Lane made a down payment of $2500, after which defendant Heart of Texas delivered the van to him. Three days later, defendant Lane was approved for credit and financing by FirstCity Funding Corporation on January 19, 1999, for the balance of the van's purchase price.

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After January 16, 1999, defendant Heart of Texas never attempted to regain custody, control or possession of the vehicle. However, the van's certificate of title was never transferred from Heart of Texas to Lane because the full price was never paid.

Heart of Texas never had any contact with defendant Holmes or had any knowledge that he was driving the vehicle.

D. *The Accident*

On March 25, 1999, the members of the Y.E.S. sales crew, including Joseph Wild, were traveling southbound in the Heart of Texas van on Interstate 90 in Rock County, Wisconsin, returning from a day of door-to-door sales. When police began pursuing the van, which was exceeding the speed limit, the driver of the van, defendant Holmes, tried to switch seats with another passenger. In the attempt, he lost control of the vehicle and the van crashed. Seven passengers of the van were killed, including Joseph Wild, and the rest were injured.

JURISDICTIONAL FACTS

At the time of the accident, defendant Karleen Hillery lived in Oklahoma. She is currently domiciled in Illinois. She has never lived or worked in Wisconsin. The two sales crews that she managed, Kay's Naturals and Kay's Supernaturals, never sold magazines in Wisconsin. She has never entered into any contracts in Wisconsin relating to the sale of magazines.

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OPINION

A. *Summary Judgment Standard*

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). However, the nonmoving party cannot rely on the allegations of the complaint alone but must set forth specific facts sufficient to raise a genuine issue for trial. *See Celotex*, 477 U.S. at 324. If no reasonable jury could render a verdict in favor of the non-moving party, the motion for summary judgment must be granted. *See id.* at 248.

B. *Motion for Summary Judgment of Karleen Hillery and Subscriptions Plus, Inc.*

1. *Personal jurisdiction over Karleen Hillery*

Karleen Hillery argues that she lacks the necessary minimum contacts with Wisconsin to allow a court in this state to exercise personal jurisdiction over her. Because she has never lived or been employed in Wisconsin, never entered into any contracts in Wisconsin relating to the sale of magazines, never personally sold magazines in Wisconsin, and none of the sales crews that she managed (Kay's Naturals and Kay's Supernaturals) sold magazines in Wisconsin, she contends that her contacts with the state are insufficient

to establish personal jurisdiction. Although defendant Hillery is the president of defendant Subscriptions Plus, Inc. and Subscriptions Plus has not objected to personal jurisdiction over it, defendant Hillery points out correctly that personal jurisdiction over a corporation cannot be the sole basis for jurisdiction over an officer. *See Pavlic v. Woodrum*, 169 Wis. 2d 585, 590, 486 N.W.2d 533, 534 (Ct. App. 1992).

Plaintiffs have the burden of establishing personal jurisdiction over defendant Hillery. *See Steel Warehouse of Wisconsin, Inc. v. Leach*, 154 F.3d 712, 714 (7th Cir. 1998). Therefore, although it is true that a corporate agent is not "shielded from personal jurisdiction if he, as agent of the corporation, commits a tortious act in the forum," *see Oxman's Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 692, 273 N.W. 2d 285, 289 (1979), plaintiffs bear the responsibility of demonstrating that the requirements of the Wisconsin long-arm statute were satisfied. They have not shown that defendant Hillery committed any tortious act within Wisconsin or that any other reason exists for subjecting her to personal jurisdiction. Accordingly, she will be dismissed from this case.

2. *Negligence claims against Subscriptions Plus*

In their complaint, plaintiffs alleged that defendant Subscriptions Plus breached its duty of care to Joseph Wild in the following ways: (a) failing to provide him with safe transportation; (b) failing to hire competent drivers to transport him; (c) allowing defendant Holmes to drive the van; (d) failing to properly supervise the drivers of the vehicle; and (e) committing "other acts of negligence."

(Although these claims were made against both defendants Subscriptions Plus and Hillery, I will refer to Subscriptions Plus only now that I have concluded that plaintiffs have not met their burden of establishing personal jurisdiction over defendant Hillery. Had I found her subject to personal jurisdiction, the discussion in this section would apply equally to the claims against her.) Defendant Subscriptions Plus contends that each of these claims must be dismissed because they fail as a matter of law.

First, defendant Subscriptions Plus argues that it can be determined as a matter of law that defendant Y.E.S./Choan Lane's relationship with defendant Subscriptions Plus was that of an independent contractor, and that defendant Subscriptions Plus cannot be held liable for the injuries of an independent contractor's employees. Second, defendant Subscriptions Plus contends that even if it cannot be determined as a matter of law that defendant Y.E.S./Lane was an independent contractor, plaintiffs' negligence claims must still be dismissed because Wisconsin's Worker's Compensation Act, Wis. Stat. §§ 102.01-102.89, would provide the exclusive remedy to the extent that Joseph Wild was an employee of defendant Subscriptions Plus. Therefore, regardless whether Joseph Wild had an employment relationship with defendant Subscriptions Plus or with defendant Y.E.S./Lane only, Subscriptions Plus argues, plaintiffs' negligence claims cannot survive summary judgment.

I conclude that it is unnecessary to determine the employment relationship among defendant Subscriptions Plus, defendant Y.E.S./Lane and Joseph Wild in order to

decide Subscriptions Plus's motion. Further, I conclude from the parties' proposed findings of fact that no reasonable jury could find defendant Subscriptions Plus liable for plaintiffs' injuries under a theory of negligence even if defendant Subscriptions Plus were Joseph Wild's employer.

a. Liability of Subscriptions Plus as an employer

Under Wis. Stat. § 102.03(2) worker's compensation is the exclusive remedy for injuries suffered by an employee when the conditions for liability under the Worker's Compensation Act are satisfied. *See Cohn ex rel. Schindell v. Apogee, Inc.*, 225 Wis. 2d 815, 819, 593 N.W.2d 921, 923 (Ct. App. 1999). Unless the statute does not apply, an injured employee is precluded from maintaining a negligence action against his employer. *See Weiss v. City of Milwaukee*, 208 Wis. 2d 95, 103, 559 N.W.2d 588, 592 (1997). Because the Worker's Compensation Act was intended to grant employers immunity from all tort liability arising from injuries to employees in exchange for absolute liability regardless of fault, the exclusive remedy provision applies to anyone seeking to recover from the employer as a result of an injury to an employee. *See Guse v. A.O. Smith Corp.*, 260 Wis. 403, 51 N.W.2d 24 (1952); *see also Franke v. Durkee*, 141 Wis. 2d 172, 413 N.W.2d 667 (Ct. App. 1987) (barring loss of consortium claim against employer brought by spouse of injured employee); *Larsen v. J.I. Case Co.*, 37 Wis. 2d 516, 520, 155 N.W.2d 666, 668 (1968) ("the sole liability of an employer because of the injury of an employee in the course of his employment, *either to the employee or to anyone else*, is under the Workmen's Compensation Law") (emphasis added); *Deluhery v. Sisters of St. Mary*, 244 Wis.

254, 12 N.W.2d 49 (1943) (barring loss of services claim against employer brought by father of injured employee). In this case, plaintiffs' action is based on the death of their son, so the exclusive remedy provision would apply to them if it would have applied to Joseph Wild, even though they have suffered their own distinct injuries. *See, e.g., York v. National Continental Insurance Co.*, 158 Wis. 2d 486, 495, 463 N.W.2d 364, 368 (Ct. App. 1990) (noting that worker's compensation benefits were parents' sole remedy against their child's employer after child was killed at work).

However, the exclusive remedy provision applies only if the conditions for liability under Chapter 102 are present. Under the act, an employer is liable if (1) the employee sustains an injury; (2) at the time of the injury, both the employer and employee are subject to the Worker's Compensation Act; (3) at the time of the injury, the employee is performing service growing out of and incidental to his or her employment; (4) the injury is not intentionally self-inflicted; and (5) the accident causing injury arises out of the employment. *See Weiss*, 208 Wis. 2d at 102, 559 N.W.2d at 591; Wis. Stat. §§ 102.03(1)(a)-(e). Whether these conditions are met and whether the exclusive remedy provision applies are questions of law. *See Weiss*, 208 Wis. 2d at 102, 559 N.W.2d at 591.

Assuming for the purpose of this discussion that Joseph Wild was an employee of defendant Subscriptions Plus (and therefore "subject to the provisions of this chapter"), the undisputed facts indicate that the conditions for liability under the act are present. Obviously, the first condition of injury is met. In regard to the second condition of coverage

under the act, an "employer" is defined as "[e]very person who usually employs 3 or more employees, whether in one or more trades, businesses, professions or occupations, and whether in one or more locations." Wis. Stat. § 102.04(I)(b)1. If members of the sales crew, which consisted of at least thirteen individuals, were employees of defendant Subscriptions Plus, then Subscriptions Plus would easily meet this requirement, and therefore be "subject to the provisions of this chapter, within the meaning of s. 102.03." Wis. Stat. § 102.04(1).

The third and fifth conditions would also be satisfied. Although Joseph Wild was not in the process of selling magazine subscriptions when the accident occurred, he was "performing service growing out of and incidental to" his employment. Wis. Stat. § 102.03(1)(f) makes this clear.

> Every employee whose employment requires the employee to travel shall be deemed to be performing services growing out of and incidental to the employee's employment at all times while on a trip, except when engaged in a deviation for private or personal purpose. Acts reasonably necessary for living or incidentally thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee's, employment.

See id. This provision establishes a presumption that an employee traveling on business is performing services arising out of and incidental to his or her employment at all times

until he or she returns unless the presumption is rebutted by evidence to the contrary. *See Wisconsin Electric Power Co. v. Labor and Industry Review Commission*, 226 Wis. 2d 778, 788, 595 N.W.2d 23, 27 (1999).

In the present case, Joseph Wild was traveling on business at the time of the accident. He and all members of the sales crew were returning from a day of door-to-door sales on the way to their hotel rooms, which would be obtained by Lane. This is not deviating "for a private or personal purpose," but rather is an act "reasonably necessary for living or incidental thereto." Therefore, Joseph Wild would have been both "performing service growing out of and incidental" to his employment and in an accident that "arose out of" his employment.

Finally, with regard to the fourth condition, Joseph Wild was injured in an accident in a vehicle he was not driving. No one suggests that his injury was intentionally self-inflicted. Therefore, if it were determined that Joseph Wild was in fact an employee of defendant Subscriptions Plus, each of the conditions of liability would be met and Chapter 102 would provide plaintiffs with their exclusive remedy.

The Worker's Compensation Act would also apply if Joseph Wild was an independent contractor in relation to defendant Subscriptions Plus. Wis. Stat. § 102.07(8)(a) provides:

> Except as provided in par. (b), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for

> whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

Subsection (b) then goes on to list nine conditions, all of which must be met before an independent contractor is not considered an "employee" under the act. These need not be discussed in detail. It is clear that Joseph Wild does not meet all of them. For example, Wis. Stat. § 102.07(8)(b) requires that the independent contractor "[m]aintains a separate business with his or her own office, equipment, materials and other facilities," that he "[h]olds or has applied for a federal employer identification number," and that he "controls the means of performing the services or work." There is no evidence that Joseph Wild maintained a separate business, supplied his own facilities or had a federal employer identification. Furthermore, he did not control the means of performing the services; the large part of the sales crew's activities was directed by defendant Lane. Regardless whether Joseph Wild was an employee or an independent contractor, worker's compensation is plaintiffs' exclusive remedy against defendant Subscriptions Plus.

b. Liability of Subscriptions Plus as a non-employer

To the extent that defendant Subscriptions Plus was Joseph Wild's employer, plaintiffs' negligence claims would be precluded. However, Chapter 102 does not bar claims against a person who had no employment relationship with the one injured. *See Estate of Thompson v. Jump River Electric*, 225 Wis. 2d 588, 593, 593 N.W.2d 901, 904 (Ct. App. 1999); *Wagner v. Continental Casualty Co.*,

143 Wis. 2d 379, 385, 421 N.W.2d 835, 837 (1988); *see also* Wis. Stat. § 102.29(1) ("The making of a claim for compensation against an employer . . . for the injury or death of an employee shall not affect the right of the employee, the employee's personal representative, or other person entitled to bring action, to make a claim or maintain an action in tort against any other party for such injury or death.") It remains to be determined whether, on the basis of the undisputed facts, defendant Subscriptions Plus could be held liable to plaintiffs if defendant Y.E.S./Lane was only an independent contractor and, consequently, Joseph Wild was an employee of defendant Y.E.S./Lane rather than of defendant Subscriptions Plus.

The general rule is that one who contracts with an independent contractor is not liable for the torts of the independent contractor. *See Snider v. Northern States Power Co.*, 81 Wis. 2d 224, 232, 260 N.W.2d 260, 263 (1977). However, commentators have observed that the general rule "has been eroded by so many well-recognized exceptions that the rule is now primarily important as a preamble to the catalogue of its exceptions." 41 Am. Jur. 2d; *Independent Contractors* § 29, at 429 (1995).

One exception to the general rule of nonliability in Wisconsin is a situation in which the principal employer has a non-delegable duty to the employees of the independent contractor. In such a situation, the principal employer is vicariously liable for the tortious conduct of the independent contractor. *See Brooks v. Hayes*, 133 Wis. 2d 228, 233, 395 N.W.2d 167, 169 (1986). The idea of a non-delegable duty rests on the premise that some responsibilities are so important that the risks of performance cannot be bargained

away. *See Estate of Thompson*, 225 Wis. 2d at 595, 593 N.W.2d at 905. The duty may be imposed by statute, contract, franchise or charter, or common law. *See id.*

I am not aware of any statute that would impose a non-delegable duty on defendant Subscriptions Plus in this situation. It is clear that defendant Subscriptions Plus did not assume through its contract with defendant Y.E.S./Lane a duty to provide safe transportation, to insure the hiring of competent drivers or to supervise the drivers of the van. In fact, the "Independent Distributor Agreement" that defendant Subscriptions Plus had with defendant Y.E.S./Lane states expressly that the "[d]istributor . . . is solely responsible for the operation and conduct of agents, contractors, solicitors, or representatives."

Although Wisconsin common law imposes a non-delegable duty upon the principal employer under circumstances involving employment that is an "abnormally dangerous activity . . . in which the risk of harm remains unreasonably high no matter how carefully it is undertaken," *See Estate of Thompson*, 225 Wis. 2d at 595, 593 N.W.2d at 905 (internal quotations omitted), neither selling magazine subscriptions nor driving a van is an "abnormally dangerous activity." Cf. *Lofy v. Joint School District #2, City of Cumberland*, 42 Wis. 2d 253, 263, 166 N.W.2d 809, 813-14 (1969) (holding that operation of bus not inherently dangerous for purpose of non-delegable duty). Therefore, defendant Subscriptions Plus cannot be held liable as the result of a nondelegable duty.

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Wisconsin common law would also impose vicarious liability on defendant Subscriptions Plus if the doctrine of apparent authority applies. *See Pamperin v. Trinity Memorial Hospital*, 144 Wis. 2d 188, 203, 423 N.W.2d 848, 854 (1988). In *Pamperin*, the court stated:

> Under apparent authority, a principal may be held liable for the acts of one who reasonably appears to a third person, through acts by the principal or acts by the agent if the principal had knowledge of those acts and acquiesced in them, to be authorized to act as an agent for the principle . . . For liability to exist, three elements must be present: (1) Acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the party sought to be held; (3) reliance thereon by the plaintiff, consistent with ordinary care and prudence.

See id. Although some members of the sales crew believed they were employed by defendant Subscriptions Plus, there are no facts suggesting that Joseph Wild or plaintiffs believed that defendant Y.E.S./Lane was an agent of defendant Subscriptions Plus or, if they did, that they relied on such a belief in any way. Therefore, defendant Subscriptions Plus cannot be held liable because of apparent authority.

Finally, defendant Subscriptions Plus could be liable to plaintiffs for the acts of an independent contractor if defendant Subscriptions Plus committed an affirmative act of negligence. Under this exception, a principal employer may be liable to the employees of an independent contractor

if the principal employer commits "an affirmative act of negligence which increased the risk of injury." *Wagner*, 143 Wis. 2d at 389, 421 N.W.2d, at 839 (quoting *Barth v. Downey Co., Inc.*, 71 Wis. 2d 775, 783, 239 N.W.2d 92, 96 (1976)). However, the principal employer cannot be held liable for only "passive inaction or a failure to take steps to protect the plaintiff from harm." *Wagner*, 143 Wis. 2d at 389, 421 N.W.2d at 839 (internal quotations omitted). Examples of "passive" acts include negligent hiring, *see id.* at 390, 421 N.W.2d at 839, and failing to discover and act on safety violations of the independent contractor, *See Estate of Thompson*, 225 Wis. 2d at 601, 593 N.W.2d at 907. Because all of plaintiffs' allegations involve "failures" (failure to supervise, failure to provide safe transportation, failure to hire a competent driver, failure to stop Holmes from driving), they could not be considered "active misconduct constituting an affirmative act." *Wagner*, 143 Wis. 2d at 389, 421 N.W.2d at 839.

On the basis of the undisputed facts, then, if defendant Y.E.S./Lane was determined to be an independent contractor, defendant Subscriptions Plus could not be held liable for defendant Y.E.S./Lane's tortious conduct. Of course, this does not mean that Subscriptions Plus would not be liable for its *own* tortious conduct against plaintiffs. *See* 41 Am. Jur. 2d, *Independent Contractors* § 30, at 429 (1995) ("Although one who employs an independent contractor may escape liability for such contractor's negligence, the employer is nevertheless answerable for its own negligence.") As noted above, plaintiffs alleged in their complaint that Subscriptions Plus had failed to hire a competent driver. If Subscriptions Plus had retained control over the selection of the van driver,

Subscriptions Plus could be found to be negligent in this regard and potentially liable to plaintiffs for the death of their son. *See United States Fidelity Guaranty v. Frantl Industries*, 72 Wis. 2d 478, 487, 241 N.W.2d 421, 426 (1976) (citing *Restatement (Second) of Torts* §§ 410, 414) (stating that principal employer liable for own negligence when it orders certain performances or retains control of certain aspects). However, the undisputed facts are that defendant Subscriptions Plus did not direct defendant Y.E.S./ Lane to choose defendant Holmes as the driver but rather lacked any involvement in the decision.

Plaintiffs alleged that defendant Subscriptions Plus was negligent in allowing defendant Holmes to drive the van, suggesting a negligent entrustment claim. Such a claim would not depend on an employment relationship between defendants Subscriptions Plus and Y.E.S./Lane or the sales crew, but would require only satisfaction of the elements for negligent entrustment. Courts in Wisconsin have adopted two theories of negligent entrustment. First, under *Restatement (Second) of Torts § 308*, "liability can arise when any person . . . who has a vehicle under his control permits another to use the vehicle if he knows, or should know that the other is unable to manage the vehicle and, therefore, injury to others is likely to result." *Bankert v. Threshermen's Mutual Insurance Co.*, 110 Wis. 2d 471, 476, 329 N.W.2d 150, 153 (1983). In addition, a person who "supplies" a piece of property may be liable for negligent entrustment if the supplier should have known that because of "youth, inexperience, or otherwise," the person to whom he gave, lent or sold the property would "use it in a manner involving unreasonable risk of harm to others whom the supplier should

expect to share in or be endangered by its use." *Restatement (Second) of Torts § 390* (adopted by *Halverson v. Halverson*, 197 Wis. 2d 525, 530, 541 N.W.2d 150, 153 (Ct. App. 1995)).

Plaintiffs have failed to establish a prima facie case of negligent entrustment because they have failed to adduce any evidence that the van defendant Holmes was driving was either under the control of defendant Subscriptions Plus or supplied by it. The undisputed facts show that the van was obtained from defendant Heart of Texas Dodge, Inc. and purchased by defendant Lane. Therefore, plaintiffs' negligent entrustment claim fails as a matter of law.

In sum, even when the facts are viewed in the light most favorable to plaintiffs, no reasonable jury could find in their favor on their negligence claims. To the extent that Joseph Wild was employed directly by defendant Subscriptions Plus, plaintiffs' exclusive remedy would be under worker's compensation. Alternatively, to the extent that defendant Y.E.S./Lane was an independent contractor of defendant Subscriptions Plus and Joseph Wild was employed by defendant Y.E.S./Lane, defendant Subscriptions Plus cannot be held liable for the tortious acts of its independent contractor. Finally, the undisputed facts do not show that defendant Subscriptions Plus's own negligence contributed to the accident. Accordingly, defendant Subscription Plus's motion for summary judgment will be granted with respect to plaintiffs' negligence claims.

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3. *Breach of agreement claim*

In Count Four of plaintiffs' complaint, they allege that defendant Subscriptions Plus "breached [its] agreement to provide Joseph Donald Wild with safe transportation." Because there is no evidence in the parties' proposed findings of fact that defendant Subscriptions Plus and Joseph Wild ever entered into such an agreement, defendant Subscription Plus's motion for summary judgment in regard to this claim must be granted as well.

C. *Acceptance Insurance Companies' Motion for Summary Judgment*

The motion filed by defendant Acceptance Insurance Companies for summary judgment is based on the contention that although Acceptance was the insurer of defendants Subscriptions Plus and Karleen Hillery, the policy it issued did not cover this accident. Thus, defendant Acceptance argues, it cannot be held liable to plaintiffs because it has no duty to indemnify defendant Subscriptions Plus or defendant Hillery. Because the motion for summary judgment filed by defendant Subscriptions Plus will be granted in all respects, defendant Acceptance's motion is moot. There can be no duty to indemnify without liability on the part of the insured. Accordingly, defendant Acceptance's motion will be denied as moot.

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D. *The Motion for Summary Judgment of Heart of Texas Dodge, Inc. and Universal Underwriters of Texas*

Plaintiffs alleged in their complaint that defendant Heart of Texas Dodge, Inc. did not actually sell a van to defendant Lane on January 16, 1999, but instead entered into a "Conditional Sale and Delivery Agreement" that was never completed. Therefore, plaintiffs alleged, defendant Heart of Texas owned and controlled the van at the time of the accident and can be held liable for "[n]egligently entrusting the Vehicle to persons who were not fit or qualified to drive the vehicle in a safe manner." Plfs.' Cpt., dkt. # 19, at ¶ 26. In addition, plaintiffs alleged that the insurance policy defendant Heart of Texas purchased from defendant Universal Underwriters of Texas provided coverage for the accident.

In their brief supporting their motion for summary judgment, defendants Heart of Texas and Universal raise the following contentions: (1) defendant Universal's insurance policy does not provide coverage for the accident; (2) defendant Heart of Texas cannot be held liable for negligent entrustment because it did not own the van at the time of the accident; (3) there is insufficient evidence for a reasonable jury to hold defendant Heart of Texas liable for negligent entrustment; and (4) holding defendant Heart of Texas liable would be against Wisconsin public policy and a violation of the contract clause of the Constitution. Because I conclude that the parties have failed to adduce sufficient evidence to allow a reasonable jury to conclude that defendant Heart of Texas is liable for negligent entrustment, it is unnecessary to address the other arguments of defendants Heart of Texas and Universal.

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As noted above, Wisconsin recognizes two theories of negligent entrustment. One who has a vehicle under her control, *See Bankert*, 110 Wis. 2d at 476, 329 N.W.2d at 153, and one who "supplies" a piece of property may be liable for negligent entrustment. *See Halverson*, 197 Wis. 2d at 530, 541 N.W.2d at 153. Under either theory, whether the defendant is alleged to have controlled the vehicle or merely supplied it, a plaintiff must establish that the alleged tortfeasor knew or should have known that the entrustment would create an unreasonable risk of harm to others.

As defendants Heart of Texas and Universal observe, neither the Supreme Court of Wisconsin nor the Wisconsin Court of Appeals has addressed the question whether a claim for negligent entrustment can be established in the context of a vehicle sale. Defendants Heart of Texas and Universal ask this court to issue a per se rule that a claim for negligent entrustment cannot be predicated on the sale of a vehicle, even where the sale is conditional in nature. I will leave that issue to be decided by the state courts of Wisconsin because its resolution is unnecessary to the determination of this motion. Even if a negligent entrustment claim could be based on a conditional sale, the elements of negligent entrustment have not been met in this case. There are no facts proposed that would suggest defendant Heart of Texas either knew or should have known that Lane intended to use the vehicle in a way that would create an unreasonable risk of harm to others or that he was likely to do so.

First, plaintiffs did not allege in their complaint that defendant Heart of Texas had any involvement in selecting defendant Holmes as the van driver or that defendant Heart

of Texas knew that defendant Lane would choose someone without a license to drive the van. Furthermore, no facts have been proposed that would suggest defendant Heart of Texas should have known that defendant Lane would use the vehicle in a way that would create an unreasonable risk of harm to others. When defendant Lane obtained the vehicle from defendant Heart of Texas, he had a valid driver's license issued by the State of Iowa and proof of insurance from Allstate Insurance Company. In short, there was no reason for defendant Heart of Texas to conclude that the vehicle would be used negligently. Accordingly, the motion for summary judgment filed by defendants Heart of Texas and Universal will be granted.

ORDER

IT IS ORDERED THAT

1. The submissions filed by plaintiffs Donald R. Wild and Diana H. Wild in response to the motions for summary judgment filed by defendants Karleen Hillery, Subscriptions Plus, Inc., Acceptance Insurance Companies, Heart of Texas Dodge, Inc. and Universal Underwriters of Texas are STRICKEN as untimely.

2. Plaintiffs' motion to enlarge the time for filing is DENIED.

3. The motion for summary judgment filed by defendant Karleen Hillery is GRANTED.

4. The motion for summary judgment filed by defendant Subscriptions Plus is GRANTED with respect to plaintiffs' breach of agreement and negligence claims against this defendant.

5. Defendant Acceptance Insurance Companies' motion for summary judgment is DENIED as moot.

6. The motion for summary judgment filed by defendants Heart of Texas Dodge, Inc. and Universal Underwriters of Texas is GRANTED.

7. Defendants Karleen Hillery, Acceptance Insurance Companies, Heart of Texas Dodge, Inc. and Universal Underwriters of Texas are DISMISSED from this case.

Entered this 6th day of December, 2000.

BY THE COURT:

s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

Supreme Court U.S.
FILED
OCT 18 2002
OFFICE OF THE CLERK

No. 02-316

IN THE

Supreme Court of the United States

DONALD R. WILD and DIANA H. WILD,

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ACCEPTANCE INSURANCE COMPANIES, SCOTTSDALE INSURANCE COMPANY, AND PROGRESSIVE NORTHERN INSURANCE COMPANY

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STATEMENT PURSUANT TO RULE 29.6

Respondent Acceptance Insurance Companies ("Acceptance") has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Scottsdale Insurance Company ("Scottsdale") is a wholly owned subsidiary of Nationwide Insurance Company.

Respondent Progressive Northern Insurance Company ("Progressive") is a wholly owned subsidiary of Progressive Corporation.

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STATEMENT OF JURISDICTION

Respondents Acceptance, Scottsdale and Progressive assert that the question presented to this Court is moot. Therefore, the court is without jurisdiction to consider the issue presented. *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969).

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete.

The District Court for the Western District of Wisconsin granted motions to strike the brief and factual submissions of Petitioners in opposition to the Respondents' summary judgment motions. The district court held that Petitioners' submissions were untimely filed and in violation of a court order that provided the dates for filing and an order that no further extensions of time to file submissions would be granted to any party for any reason. The district court did note, "[a]s a practical matter, this ruling makes little difference to the outcome of the motions." (Pet. App. 23a)

On Petitioners' appeal to the Seventh Circuit, the court concluded that the District Court for the Western District of Wisconsin erred when the Court determined that it had no personal jurisdiction over Karleen Hillery ("Hillery"). (Pet. App. 7a)[1] The court of appeals also confirmed that, had the district court ruled correctly and found jurisdiction, Hillery would have been dismissed on the merits of the case, as was her company, Subscriptions Plus, Inc. *Id.*

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1. The court of appeals referred to decision from a pending state court action arising out of the same accident, *Forgues v. Heart of Texas Dodge, Inc.*, No. 99 CV0952 (Wis. Cir. Ct. Nov. 5, 2001), wherein the Wisconsin state court found personal jurisdiction over Hillery.

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED IS MOOT

Petitioners maintain that the original transfer of their case from Louisiana to Wisconsin, pursuant to 28 U.S.C. § 1406(a), was improper on the grounds that the transferee court did not have jurisdiction over all the defendants. That issue presented by Petitioners for review by this court is moot. The controversy has been resolved by both the Seventh Circuit Court of Appeals and by the transferee court and the relief requested by Petitioners would no longer serve any purpose.

"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell*, 395 U.S. at 496. If the relief requested by judicial review would no longer serve any purpose, the issue is declared moot. 15 James Wm. Moore et al., *Moore's Federal Practice* ¶ 101.90 (3d ed. 2001). Mootness can occur by virtue of a decision rendered by another court. *Aiana v. Judiciary of Hawaii*, 17 F.3d 1244, 1248 (9th Cir. 1994). If the case becomes moot on appeal, this Court lacks jurisdiction to consider the issue. *Powell*, 395 U.S. at 496.

Petitioners' action was originally filed in federal court in Louisiana and transferred to the District Court for the Western District of Wisconsin. The district court, on motions for summary judgment, dismissed the action against Karleen Hillery on the grounds the court lacked personal jurisdiction. The court granted summary judgment in favor of a number of the other defendants on the merits of the case. Petitioners moved the court to retransfer the case to Louisiana maintaining that the transfer had been improper because the

Wisconsin district court did not have jurisdiction over all the defendants. That motion was denied. Petitioners appealed to the Seventh Circuit Court of Appeals.

The court of appeals determined that the district court had erred in finding no jurisdiction over Hillery. (Pet. App. 7a, 11a) The appellate court also affirmed the district court's rulings on the merits of the case as to the other defendants. (Pet. App. 11a) The court recognized that the fact the district court had made an erroneous decision on jurisdiction really had no impact on Petitioners' current position. The court stated:

> Supposing the district judge had gotten Wisconsin law right when she ruled on Hillery's motion to dismiss for want of personal jurisdiction (that is, supposing she had anticipated the decision in Forgues), Hillery would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscriptions Plus, would have gone down the drain with that claim. As it is, the claim against her remains alive in the district court [the second action]—if barely, since the defendants have moved to dismiss it as barred by res judicata. Still, the plaintiffs are no worse off, or, in any practical sense, differently situated, than if the district judge had not mistakenly dismissed Hillery, thus raising the retransfer issue.

(Pet. App. 7a) In other words, the issue is in fact moot, because any relief requested in regards to the jurisdiction issue no longer would serve any purpose to the Petitioners. It is this very issue and the only issue, for which the Petitioners seek certiorari from this Court.

Further, the fact that the district court initially dismissed the case as to Hillery, as the appellate court noted, has no effect. The district court in her decision held that if it had jurisdiction over Hillery, the same findings as to Subscriptions Plus, Inc. (resulting in the granting of summary judgment in favor of Subscriptions Plus, Inc.) would be applicable to Hillery. The court of appeals considered the merits of the summary judgment motions filed by the defendants. It concluded that had the district court ruled correctly that it had personal jurisdiction over Hillery, the claims against Hillery would have been dismissed on summary judgment along with the claims against Subscriptions Plus, Inc. (Pet. App. 7a)

The court of appeals also referred to a second action filed by the Petitioners. *Id.* Following the district court's denial of Petitioners' motion to retransfer, Petitioners started two other actions against Hillery and other defendants[2] in Louisiana. The cases were consolidated and transferred back to Wisconsin. (Pet. App. 6a) This time, however, neither Petitioners nor Hillery raised the issue of a lack of jurisdiction over Hillery.[3]

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2. Petitioners' initial action was against Hillery, Subscriptions Plus, Inc., Y.E.S.! Inc., Choan Lane, Jeremy Holmes, Heart of Texas Dodge, Inc., Scottsdale Insurance Company, Acceptance Insurance Company, Progressive Northern Insurance Company, Allstate Insurance Company, Universal Underwriters Insurance Company and Mutual fire and Automobile Insurance Company. The second actions are against Hillery, Progressive Northern Insurance Company, Scottsdale Insurance Company, Acceptance Insurance Companies, Choan A. Lane, Jeremy Holmes and National Publishers Exchange.

3. Around that same time, a Wisconsin state court in Dane County, in a case arising from the same accident, found jurisdiction over Hillery.

In the second action, defendants filed motions to dismiss based upon the doctrines of issue and claim preclusion. The District Court for the Western District of Wisconsin recently issued a decision on those motions. The court acknowledged that the court of appeals had confirmed that the district court had jurisdiction to decide the first case. (Res. App. 4a) While the court dismissed the negligence claims and contract claims as barred by the doctrines of issue and claim preclusion the court permitted the false representation and alleged fraudulent advertising for labor claims to proceed against Hillery and other defendants because those claims were not alleged in Petitioners' initial action. (Res. App. 9a-10a, 14a)

In Petitioners' subsequent actions against Hillery, the district court again considered Petitioners' claims against Hillery arising out of the accident. The court noted that Petitioners had added new causes of action and incorporated some of the earlier ones concluding:

> The vast majority of them do not raise any new issues in the sense that they relate to matters not previously litigated. Plaintiffs assert defendant Hillery's alleged responsibility for providing plaintiffs' son with safe transportation, her alleged relationship to the driver of the van or the head of the crew in which plaintiffs' son was working, her alleged negligent hiring, her alleged negligent entrustment of the van to the head of the crew, her alleged supplying of drugs and alcohol to the crew members, her alleged false representations about the nature of the magazine selling jobs, her alleged fraudulent advertising for labor (which appears to overlap the alleged false

> representations), her involvement in a joint enterprise with others, including defendant National Publishers Exchange and her breach of her contract with plaintiffs' son to provide him safe transportation. Despite the new packaging, most of plaintiffs' claims are simply rehashed versions of the allegations they made against Subscriptions Plus and Hillery the first time around.

(Res. App. 4a-5a) The case is currently pending before the District Court in the Western District of Wisconsin. Petitioners are no differently situated than if the first case had been retransferred to Louisiana.

If this case had been transferred back to Louisiana for a jurisdictional analysis, the Louisiana court would either have dismissed the case for improper venue or transferred the case to Wisconsin because Wisconsin, not Louisiana, is the proper venue in this case. (Pet. App. 16a). The District Court for the Eastern District of Louisiana determined that Louisiana was not a proper venue for suing the defendants because the defendants did not reside there and "a substantial part of the events or omissions giving rise to the claim" had not taken place there. (Pet. App. 6a)

The relief, therefore, requested by Petitioners in this writ would no longer serve any purpose. *See* 15 James Wm. Moore, *Moore's Federal Practice*, ¶ 101.90 (3d ed. 2001). The question before this Court is moot.

II. PETITIONERS SHOULD BE FOUND TO HAVE WAIVED THE ISSUE OF WHETHER TRANSFER WAS PROPER.

Petitioners' actions should support a finding of waiver in this case. After the action was filed in the District Court for the Eastern District of Louisiana, one of the defendants, Allstate Insurance Company, filed a motion to dismiss, or in the alternative, a motion to transfer the case to Wisconsin on the grounds that Wisconsin was the proper venue. The Petitioners opposed the motion but *never* raised the issue of a lack of jurisdiction over any of the defendants as grounds for opposing the transfer.

The case was transferred to the Western District of Wisconsin on January 21, 2000. Following the transfer, Petitioners did nothing with regard to the transfer. They filed no motion to retransfer the case. They raised no issue concerning a lack of jurisdiction by the Wisconsin court over Hillery. An appropriate procedure for a party seeking relief from the transfer is to move for retransfer from the transferee court. *National-Standard Co. v. Adamkus*, 881 F.2d 352, 356 (7th Cir. 1989). The Wilds made no such motion or raised any jurisdictional issue before the District Court when the case was transferred.

Subsequently, this case proceeded in the Western District of Wisconsin. Much discovery took place over the next eight months. Following discovery and pursuant to the court's scheduling order, numerous parties, including SPI and Hillery, filed summary judgment motions. In conjunction with those motions, the parties filed extensive briefs, affidavits, and proposed findings of fact and conclusions of law. In her brief, Hillery sought dismissal based upon a lack

of jurisdiction and upon the merits of the case. In response, Petitioners, contrary to their current position, argued that the Wisconsin court had jurisdiction over Hillery. Again, Petitioners *never* argued in the alternative, that if there was no jurisdiction, the Wisconsin court should retransfer the case to Louisiana.

On December 6th, 2000, in a 38-page decision on the summary judgment motions, the district court granted summary judgment to the defendants, including Hillery.[4] Only then, after an adverse decision by the court granting judgment in favor of Hillery and the other defendants, did the Petitioners for the first time, raise the issue that the transfer was improper for lack of jurisdiction.

Petitioners had ample opportunity to raise the issue before the Louisiana court and ample opportunity to raise the issue before the district court, prior to the court's order granting summary judgment. While Petitioners raised the issue prior to the district court's entry of judgment, they did so only after the parties spent substantial time and money conducting discovery and extensively briefing the merits of the case for summary judgment. In addition, the district court likely had spent substantial time considering and deciding the motions. Petitioners should not be allowed to utilize the transfer provisions of § 1406(a), after an adverse decision by the court on motions for summary judgment, to circumvent the court's ruling to get another "kick at the cat."

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4. As to Acceptance Insurance Companies, the court denied its motion as moot since it couldn't be liable if its insureds were dismissed. (Pet. App. 52a).

Waiver is an equitable doctrine invoked by courts to further the interests of justice. *L. Orlik v. Helm Products, Inc.*, 427 F. Supp. 771, 776 (D.C.N.Y. 1977). It is a discretionary doctrine. *McKnight v. Gingras*, 966 F. Supp. 801, 809 (E.D. Wis. 1997). Courts have consistently disfavored party's attempts to advance new arguments or evidence once a matter has been litigated and have utilized the doctrine of waiver.

In *National-Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989), the court held that a party raising for the first time on appeal, whether the transfer order changing venue was properly granted, had waived the issue. *Id.* at 356. In this case, the Petitioners raised the issue prior to appeal, but not until after the court rendered a decision dismissing Petitioners claims against the defendants. In the interests of justice, fairness, and judicial economy, Petitioners should not be able to seek retransfer for the first time upon receipt of an adverse decision.

In *Moro v. Shell Oil Company*, 91 F.3d 872 (7th Cir. 1996), following the district court's granting of summary judgment in favor of the defendant, the plaintiff moved to alter or amend the judgment, pursuant to Rule 59(e). The district court denied plaintiff's motion. On appeal the court upheld the district court's ruling:

> The rule does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.

Id. at 876 (*citing LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995)).

In *Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964), this Court, in addressing the issue of a party changing venue, pursuant to 28 U.S.C. § 1404(a), to obtain a more favorable state law, stated:

> The legislative history of § 1404 (a) certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.' Indeed an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a). If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument. * * * We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.

Id. at 636-37. *See also Krueger International, Inc. v. Blank*, 225 F.3d 806, 810 (7th Cir. 2000) (where the court held that a party had waived an argument since "it had ample opportunity to present this alternative argument prior to entry of judgment.)

Similarly in the present action, Petitioners should not be permitted to seek retransfer of the action in hopes of obtaining a better result, after the case has been completely litigated and they received an adverse decision. The Wisconsin district court commented:

> Transferring the case back to Louisiana would undermine the interests of justice because doing so would greatly delay the trial. Finally, plaintiffs have not lost the ability to bring suit against

> defendants whom this court has dismissed. Nothing prevents plaintiffs from filing suit against those defendants in a district where personal jurisdiction exists.

Id. at (Pet. App. 19a). This Court should deny the writ as Petitioners have waived the issue.

CONCLUSION

The Petition should be denied on the grounds that the question presented is moot and therefore the Court lacks jurisdiction over this case. In the alternative, the Petition should be denied on the grounds that the Petitioners have waived the issue presented to this Court.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED SEPTEMBER 30, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

01-C-0461-C

DONALD R. WILD and DIANA H. WILD, Individually and as representatives of the Estate of Joseph Donald Wild,

Plaintiff,

v.

KARLEEN HILLERY; PROGRESSIVE NORTHERN INSURANCE COMPANY; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANIES; CHOAN A. LANE, JEREMY HOLMES; and NATIONAL PUBLISHERS EXCHANGE,

Defendants.

Appendix

01-C-0463-C

DONALD R. WILD and DIANA H. WILD, Individually and as representatives of the Estate of Joseph Donald Wild,

Plaintiff,

v.

KARLEEN HILLERY; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANIES; CHOAN A. LANE, JEREMY HOLMES; and NATIONAL PUBLISHERS EXCHANGE,

Defendants.

OPINION AND ORDER

These are civil actions brought by the parents of a young man killed in a van accident while he was working as a magazine subscription salesman. The actions duplicate in large part an action filed by plaintiffs in 2000 and closed in 2001, *Wild v. Subscriptions, Plus, Inc.*, 00-C-0067-C. For that reason, most of the defendants moved for dismissal from the actions on the ground that principles of claim preclusion barred any further litigation against them. In an opinion and order entered on May 13, 2002, I dismissed certain defendants from the suits after finding that they were correct in asserting that claim preclusion barred new suits against them but I concluded that the doctrine would not bar suits against the remaining defendants for various reasons. As to defendant Karleen Hillery, she had been dismissed from plaintiffs' original suit, not on the merits but because the court lacked personal jurisdiction over her. Her insurers,

defendants Acceptance and Scottsdale, remained potentially liable as long as she might still have some liability. Defendants Choan A. Lane and Jeremy Holmes had been dismissed on the basis of a settlement; no judgment had been entered as to them. Defendant National Publishers Exchange was not a party to the original action; obviously no judgment on the merits had been issued as to it. I noted that although claim preclusion was not applicable to the claims against these defendants, issue preclusion might bar further litigation of the suits and I invited the parties to submit supplemental briefs on the subject. All except defendants Lane and Holmes responded to the invitation.

As a general rule, claim preclusion refers to the effect that a prior judgment has in foreclosing successive litigation of the same claim or cause of action against the same party; issue preclusion refers " 'to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.' " *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001) (citing *Restatement (Second) of Judgments* §§ 17, 27 (1980)). Issue preclusion requires a showing that the same issue has been actually litigated and necessarily decided in a prior action and that the party against whom preclusion is asserted was a party to the prior action. *Garza v. Henderson*, 779 F.2d 390, 393 (7th Cir. 1985). It is not necessary that the person asserting preclusion have been a party to the previous action. If a party can be barred from re-litigating the issue with its opposing party, it can be barred from litigating the issue against a third party, unless the party to be precluded deserves an additional opportunity to litigate

the issue because of particular circumstances, such as the lack of a full and fair opportunity to litigate in the first action. *Restatement (Second) of Judgments* § 29. *See also Adair v. Sherman*, 230 F.3d 890, 893 (7th Cir. 2000) (" 'Under collateral estoppel (currently referred to as issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.' ") (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

It is undisputed that the earlier case was decided by a court of competent jurisdiction. Although plaintiffs argued strenuously to the contrary, both in that case and in these two, the Court of Appeals for the Seventh Circuit has confirmed that this court did have jurisdiction to decide the first case. *Wild v. Subscription [sic] Plus, Inc.*, 292 p.3d 526 (7th Cir. 2001). I turn then to the question whether the issues raised by plaintiffs in these two new cases are ones that were "actually and necessarily determined" an plaintiffs' previous case, 00-C-0067-C, as to each of the remaining defendants.

A. *Karleen Hillery*

In their pleadings in these cases, plaintiffs have added new causes of action against defendant Hillery and incorporated some of their earlier ones. The vast majority of them do not raise any new issues in the sense that they relate to matters not previously litigated. Plaintiffs assert defendant Hillery's alleged responsibility for providing plaintiffs' son with safe transportation, her alleged relationship to the driver of the van or the head of the crew in which plaintiffs' son

was working, her alleged negligent hiring, her alleged negligent entrustment of the van to the head of the crew, her alleged supplying of drugs and alcohol to the crew members, her alleged false representations about the nature of the magazine selling jobs, her alleged fraudulent advertising for labor (which appears to overlap the alleged false representations), her involvement in a joint enterprise with others, including defendant National Publishers Exchange and her breach of her contract with plaintiffs' son to provide him safe transportation. Despite the near packaging, most of plaintiffs' claims are simply rehashed versions of the allegations they made against Subscriptions Plus and Hillery the first time around.

In the previous case, I found that Subscriptions Plus could not be held liable for any of plaintiffs' claims of negligence in hiring or in supervising plaintiffs' son. Wisconsin's worker's compensation law barred any court action against Subscriptions Plus if it were Joseph Wild's employer or if Joseph Wild were working as an independent contractor in relation to Subscriptions Plus; plaintiffs had failed to produce evidence to support a finding of liability arising out of the negligent acts of an independent contractor of theirs who employed Joseph Wild; plaintiffs had adduced no evidence to support a finding that Subscriptions Plus had committed a negligent act that resulted in Joseph Wild's death. In drawing these conclusions, I found necessarily that defendant Hillery could not be liable for any of these claims because corporations act only through their officers, employees or agents. If plaintiffs had produced any evidence that defendant Hillery (or any other employee of Subscriptions Plus) had acted in a way that would have made the corporation liable to plaintiffs,

I could not have found the corporation free from liability. This implicit finding has as much preclusive effect as an explicit finding. *Cook County v. MidCon Corp.*, 773 F.2d 892, 902 n.2 (7th Cir. 1985) ("Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue, then, is subsumed in that issue and precluded by the prior judgment's collateral estoppel effect") (quoting 1B. *Moore's Federal Practice* ¶ 0.443[2] at 761). In fact, I made the finding explicit when I noted that if defendant Hillery had not been dismissed for lack of personal jurisdiction, the findings as to Subscriptions Plus would apply to her.

In the earlier suit, I found also that Subscriptions Plus could not be held liable for breach of contract because plaintiffs had failed to adduce any evidence that this defendant had ever entered into an agreement with Joseph Wild. The doctrine of issue preclusion bars plaintiffs from pursuing this issue with respect to defendant Hillery.

Plaintiffs repeat reflexively their old argument that they never had a chance to be heard because of the court's refusal to entertain their untimely filed proposed findings of fact and brief in opposition to defendants' motion for summary judgment. As I explained in the May 13 order, the *opportunity to be heard* is not the same as *being heard*, which is something that can be forfeited or waived. Plaintiffs had the required opportunity but forfeited it by missing the deadline. Moreover, their submissions were deficient; even if they had been timely, they would not have advanced plaintiffs' case. For example, plaintiffs responded to a fact proposed by defendants Hillery and Subscriptions Plus to the effect that

neither defendant owned the vehicles that Choan Lane used in his business by saying: "Denied. Subscriptions Plus and Hillery provided vehicles used by the independent distributors and the independent contractors to sell magazines. See Plaintiffs' brief and evidence submitted therein in support of the argument." This response does not comply with the court's rules on summary judgment, which specify that the response is to be supported by citations to admissible evidence in the record. Merely telling the court to look at unspecified evidence in the brief is not compliance, particularly when the brief refers the court to "attached exhibits" that are not attached. Plaintiffs describe their "evidence" as Subscriptions Plus's web site pages, showing that Subscriptions Plus offered transportation for its independent contractors. Assuming there is such evidence, it does not shed light on the legal relationships among Joseph Wild and Subscriptions Plus and Hillery. In any event, plaintiffs failed to convince the court of appeals that they were denied the right to be heard. That should be an end to the issue.

Plaintiffs argue that the court never determined whether Joseph Wild was an employee of Subscriptions Plus. They are correct. I did not make the determination because there was no reason to. Whatever relationship Subscriptions Plus and Hillery had to Joseph Wild, they could not be held liable to him on the facts in the summary judgment record.

Plaintiffs argue that the court did not decide what Hillery's liability would be under the third assumption, that Wild was an employee of Y.E.S./Lane and Y.E.S./Lane was an independent contractor. I determined that Subscriptions Plus would have no liability for the torts of the independent

contractor because I found that plaintiffs had not shown that the company had a non-delegable duty to the employees of Y.E.S./Lane. Implicit in that finding was the related finding that Hillery had no duty to provide safe transportation, to insure the hiring of competent drivers or to supervise the drivers of the van. Obviously, if plaintiffs had been able to show that Subscriptions Plus's president, defendant Hillery, had assumed such a duty, I would not have reached the conclusion I did about Subscriptions Plus's liability. The same conclusion follows from plaintiffs' failure in the earlier case to show that Joseph Wild believed that defendant Y.E.S./Lane was an agent of defendant Subscriptions Plus and relied upon that belief or to show that defendant Subscriptions Plus engaged in an "affirmative act" of negligence that increased the danger Joseph Wild or to show that the company's own negligence caused Joseph Wild's death.

Citing the state court's ruling in a related action, plaintiffs contend that this court could have found that Hillery had sufficient control to defeat the argument that Y.E.S. was an independent contractor, that in fact she furnished the vehicles to the crews, provided transportation, paid their expenses and issued quotas to the sales force. They quote the state judge's finding that "Hillery gave orders on who was to drive which car because one of them was her luxury van." They argue, incorrectly, that this court has never decided Hillery's role. I did decide Hillery's role, by implication, as I have explained. That decision might have been different had plaintiffs supplied to this court the evidence that was before the state court. They did not do so when they had the opportunity. They cannot reopen issues now that have been

decided in case 00-C-0067-C simply because another judge has reached a different decision in another case involving defendant Hillery.

As for plaintiffs' claim that Hillery's involvement is supported by the affidavit of Choan Lane, they neglect to mention that at the time they responded to defendants' motion for summary judgment in the original case they had not taken Lane's deposition and had no affidavit from him. They leave out the additional fact that the magistrate judge subsequently ruled Lane's affidavit and testimony inadmissible because Lane refused to testify at his deposition on most matters. Plaintiffs cannot avoid the effect of adverse rulings in Case No. 00-C-0067-C by filing a new suit raising the same issues.

All this discussion may well be extraneous, as well as redundant. The Court of Appeals for the Seventh Circuit dealt with the whole matter far more succinctly in its decision affirming the dismissal of Subscriptions Plus in the earlier case. It observed that if defendant Hillery had been properly found subject to personal jurisdiction in Wisconsin, she "would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscription Plus, would have gone down the drain with that claim," *Wild*, 292 F.3d at 530. I conclude that the doctrine of issue preclusion bars plaintiffs' negligence and contract claims.

This leaves only the allegations that defendant Hillery made false representations about the nature of the magazine selling jobs and her alleged fraudulent advertising for labor.

Although plaintiffs do not make it entirely clear, it appears that they are alleging intentional acts rather than negligent ones. Their claims of intentional wrongdoing were not litigated in the previous suit and therefore, are not barred by issue preclusion. I have serious doubts whether plaintiffs can prove either that defendant Hillery made false representations to Joseph Wild that he relied upon or that his reliance was a legal cause of his death, but at this point, I cannot say that plaintiffs cannot go forward on these two allegations.

B. *Scottsdale and Acceptance*

Scottsdale Insurance Company and Acceptance Insurance Companies remain in this suit only because of their possible duty to insure or defend defendant Karleen Hillery. So long as she remains a party, they do too.

C. *National Publishers Exchange*

Plaintiff alleges that defendant National Publishers is liable for misrepresentation and fraudulent advertising, as a joint venturer with Subscriptions Plus. These allegations are new as to this defendant, which was not a party to the previous litigation. I have serious doubts whether any of them can be proven, but at this stage of the litigation, I cannot say that they are barred by issue preclusion, which is the only ground that I am considering on this motion for summary judgment. If defendant National Publishers has reason to believe that plaintiffs lack evidentiary support for their allegations and will not secure such evidence after they have had a reasonable time for discovery, defendant can follow the procedures in Fed. R. Civ. P. 11 for seeking sanctions against plaintiffs.

Appendix

Plaintiffs name National Publishers in four counts. Only three could be considered actual causes of action. In count 8, plaintiffs allege that National Publishers, along with defendants Subscriptions Plus, Hillery, Y.E.S. and Lane are equitably estopped from raising the defense that Joseph Wild was an employee of any of the defendants (in which case, plaintiffs' only remedy would be under Wisconsin's Worker's Compensation Act). As National Publishers points out, this is not a cause of action but the anticipation of an affirmative defense that defendants might raise. In count 9, plaintiffs allege that defendant National Publishers participated in a common scheme or plan with Subscriptions Plus, Hillery, Y.E.S. and Lane, which involved the making of false representations or the failure to prevent the making of false representations in order to lure young adults such as Joseph Wild into magazine sales work. In count 11, plaintiffs allege that defendants National Publishers, Subscriptions Plus, Y.E.S., Lane and Hillery were involved in a joint venture, thus making each of them liable for the negligence of the others. In count 12, plaintiffs allege that defendant National Publishers participated with one or more of Subscriptions Plus, Hillery, Y.E.S. and Lane in the development of various magazine marketing and selling schemes and that they lured Joseph Donald Wild "from his home by false or deceptive representations and/or false pretenses regarding the kind and character of the work to be done, the amount and character of the compensation to be paid for work, the providing of safe transportation, and the conditions of employment relating to his streets trades activities as a seller of magazines." Cpt., dkt. #1, at 19.

Conceding that they cannot pursue the claim that National Publishers is vicariously liable as a joint venturer for the negligence of Subscriptions Plus, as alleged in the eleventh cause of action, now that Subscriptions Plus has been dismissed from the action on the grounds of claim preclusion, plaintiffs suggest that they can proceed on the theory that National Publishers was part of an enterprise that included Y.E.S./Lane. This is true only if plaintiffs have grounds for showing that any of the alleged joint venturers was negligent. As a matter of law, defendants Subscriptions Plus and Hillery could not be held liable under a theory of negligence but no such finding has been made as to defendants Y.E.S, and Lane. Y.E.S. is no longer a party to this case but that does not mean that plaintiffs could not prove it was negligent and that it was engaged in a joint venture with National Publishers. (Y.E.S. was dismissed from these cases in the same May 13, 2002 order in which Subscriptions Plus was dismissed.)

Defendant National Publishers argues that it cannot be held vicariously liable for Lane's negligence because Lane has been released from the case by settlement. However, a review of the release shows that plaintiffs released Lane from the prior case only as to claims for which he and Jeremy Holmes had liability coverage provided by Allstate Insurance Company and Allstate Indemnity Company. Plaintiffs made an express reservation of any claims for which Lane and Holmes might have insurance coverage provided by a different insurer, It seems unlikely that Lane and Holmes have any such additional coverage, given plaintiffs' inability to ferret out any in the first case, but I cannot say that they

do not. Moreover, plaintiffs' allegations are not limited to negligence; they allege a scheme to make or authorize the making of false representations, which is an intentional tort.

Defendant argues that issue preclusion bars the allegations of false representations and false advertising made in the ninth and twelfth causes of action because this court found previously as undisputed the fact that defendant Subscriptions Plus had no involvement in the selection of employees for the Y.E.S. sales crew. Defendant mischaracterizes the finding. I did find that defendants Holmes and Lane did the selecting and hiring but I never found that Subscriptions Plus had no involvement in the selection or that the company never made any misrepresentations or engaged in false advertising. Although plaintiffs are barred from asserting these claims against defendants Subscriptions Plus and Y.E.S.!, they are not barred from asserting them against defendant National Publishers, Hillery and Lane (to the extent that the claims against Lane are covered by insurance issued from a company other than Allstate). However, before plaintiffs can continue to prosecute the case, they will be required to amend their pleadings against the remaining defendants to conform with the requirements of Fed. R Civ. P. 9(b), that the circumstances underlying allegations of fraud must be stated with particularity. Plaintiffs will have to identify the exact representations and advertisements they contend were false, who made them, when and to whom and in what circumstances.

Appendix

ORDER

IT IS ORDERED that

(1) Defendant Karleen Hillery's motion for dismissal on the ground of issue preclusion is DENIED with respect to plaintiffs Donald R. Wild and Diana H. Wild's claim that she made false representations, engaged in false advertising upon which plaintiffs' son relied to his detriment and engaged in a scheme to do these things; in all other respects, it is GRANTED;

(2) The motions for dismissal filed by defendants Acceptance Insurance Companies and Scottsdale Insurance Company are DENIED;

(3) The motion for dismissal on the ground of issue preclusion filed by defendant National Publishers Exchange is DENIED; and

(4) Plaintiffs may have until October 15, 2002, in which to amend their complaints in these cases to set forth their allegations of fraud with the particularity required by Fed. R. Civ. P. 9(b). Failure to file timely amended complaints may lead to the dismissal of both cases.

Entered this 30th day of September, 2002.

BY THE COURT:

s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

Supreme Court, U.S.
FILED
OCT 18 '02
CLERK

No. 02-316

In The
Supreme Court of the United States

DONALD R. WILD and DIANA H. WILD,

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS HEART OF TEXAS DODGE, INC.'S AND UNIVERSAL UNDERWRITERS INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a transfer under 28 U.S.C. § 1406(a) of a multi-defendant lawsuit proper where the transferor court has determined that venue in the district of the transferor court was improper under 28 U.S.C. § 1391(a) and only one of the defendants is not subject to the transferee court's personal jurisdiction?

CORPORATE STATEMENT

Pursuant to Rule 29.6, Respondent Heart of Texas Dodge, Inc. ("Heart of Texas"), has no parent corporation and there are no publicly held companies that own 10% or more of its stock. The parent company and owner of more than 10% of the stock for Respondent Universal Underwriters Insurance Company, properly identified as Universal Underwriters of Texas ("Universal"), is Zurich American Insurance Company.

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STATEMENT OF THE CASE

The Petitioners Donald and Diana Wilds' ("the Wilds") Statement of the Case does not state all of the relevant facts, and includes arguments and allegations irrelevant to the question presented to this Court.

Respondent/defendant Allstate Insurance Company ("Allstate") brought a motion before the Louisiana district court seeking, among other things, to transfer this case from Louisiana to Wisconsin pursuant to 28 U.S.C. § 1406(a) on the grounds that Louisiana was not a proper venue for this matter under 28 U.S.C. § 1391. The Wilds' only argument in opposition to Allstate's motion was that venue was proper. The Wilds did not challenge the legality of transferring the case to Wisconsin. The Louisiana district court held that venue was not proper in the Eastern District of Louisiana, and that it was in the interests of justice to transfer the matter to Wisconsin. The transfer of the case to Wisconsin was completed on February 1, 2000.

The Wisconsin district court received the action from the Louisiana district court on February 1, 2000. (Record 1.) On April 14, 2000, the Wilds filed an amended complaint that differed from the original complaint. Among other things, it added allegations establishing proper venue in the Wisconsin district court and personal jurisdiction over each of the defendants, including respondent/defendant Karleen Hillery ("Hillery"). (Record 19.) On May 15, 2000, respondent/defendant Progressive Northern Insurance Company answered the amended complaint and asserted as an affirmative defense that the Wisconsin district court lacked personal jurisdiction over Hillery.

(Record 22.) Approximately five months after the affirmative defense asserting lack of personal jurisdiction over Hillery was raised, Hillery moved for summary judgment on the claims against her on the ground that the Wisconsin district court lacked jurisdiction over her. The Wilds opposed the motion, arguing that the Wisconsin district court did have jurisdiction over Hillery. (Record 116.) The Wisconsin district court, in a decision dated December 6, 2000, granted Hillery's motion in a decision that also granted summary judgment against the Wilds on virtually every single claim against each of the defendants, including Heart of Texas and Universal. (Pet. App. D.) Only at that time – roughly eight months after the Wilds were put on notice that the Wisconsin district court may not have had personal jurisdiction over Hillery, and having lost most of their claims against the various defendants – did the Wilds first assert that the question of whether or not one or more of the various defendants was not subject to personal jurisdiction was relevant to the issue of whether or not the transfer from Louisiana to Wisconsin was proper. (Pet. App. C.)

SUMMARY OF THE ARGUMENT

Heart of Texas and Universal assert that this case is unique and the decision of the Seventh Circuit was narrowly tailored to deal with the specific issues of this case. The decision of the Seventh Circuit, contrary to the Wilds' assertions, is not in conflict with this Court's decision in *Hoffman v. Blaski*, 363 U.S. 335 (1960), nor does it conflict with the decisions of the other circuits.

As distinguished from *Blaski*, this case does not present a situation where venue and/or jurisdiction are lacking over all defendants. Rather, this is a case that "could have been brought" in the Wisconsin district court, except for as against one of the 13 defendants due to lack of personal jurisdiction over the one defendant.

This case also differs from the circuit court cases cited by the Wilds in that the Wilds failed to timely raise any objections to the transfer based on lack of personal jurisdiction and/or venue over the defendants. The parties opposing transfer in the cited circuit court cases made timely objections to the propriety of the proposed transfers.

ARGUMENT

The issue raised by the Wilds is whether a transfer under 28 U.S.C. § 1406(a) is invalid even though venue is proper as to all defendants in a multi-defendant case, but personal jurisdiction is lacking over one of the 13 defendants. The Seventh Circuit held that the transfer in this case was proper, which the Wilds dispute, asserting that the Seventh Circuit's conclusion conflicts with this Court's decision in *Hoffman v. Blaski*, 363 U.S. 335 (1960) and with the decisions of other circuits. The Wilds' assertions are incorrect. *Blaski* and the circuit court cases cited by the Wilds in their petition factually differ from this case, and properly played no role in the Seventh Circuit's decision.

In this case, it is undisputed that venue was proper in the Wisconsin district court as to all 13 defendants. It has also never been disputed that the Wisconsin district court

had personal jurisdiction over 12 of the 13 defendants. The Wisconsin district court's jurisdiction decision was not the last word on the issue. A Wisconsin state court, addressing the identical personal jurisdiction issue in a lawsuit arising out of the same subject accident and involving the same defendants, later ruled that Hillery was subject to personal jurisdiction in Wisconsin. (*See* Pet. App. A.)

Based on the very specific facts of this case, the Seventh Circuit held that the lack of jurisdiction over one of 13 defendants did not make the transfer improper, entitling the Wilds to a "retransfer" back to Louisiana. *Blaski* did not address the very narrow issue before the Seventh Circuit, which was whether lack of jurisdiction over one of 13 defendants where venue was proper as to all defendants required retransfer. Rather, *Blaski* addressed the more basic issue of whether an action can be transferred to a district where neither venue *nor* jurisdiction is proper as to *any* defendant. 363 U.S. at 341; *Van Dusen v. Barrack*, 376 U.S. 612, 620 (1965) (*Blaski* "held that, despite the defendant's waivers or consent, a forum which had been improper for *both* venue *and* service of process was not a forum where the action 'might have been brought'" for the purposes of sec. 1404(a)) (emphasis added). The Court held that where both venue and jurisdiction are lacking as to all defendants, the action is not one that "might have been brought" in the transferee court and the action could not be transferred. *Id.* In such circumstances, if the original action had been filed in the transferee court to begin with, the *entire action* would have had to have been dismissed because it could not be maintained against *any* defendant.

In contrast, had this lawsuit originally been filed in the Wisconsin district court, the *action* as a whole would

have properly proceeded in that court (with summary judgment ultimately being entered against the Wilds). The action clearly "could have been brought" in the Wisconsin district court.

This case is also distinguishable from each of the other circuit court cases cited by Wilds in their petition. None of the plaintiffs in those cases clearly waived an established right to challenge the transfer on venue or jurisdiction. *See Blaski*, 363 U.S. 335; *Chrysler Credit Corp. v. Country Chrylser, Inc.*, 928 F.2d 1509 (10th Cir. 1991); *Shutte v. Armco Steel Corp.*, 431 F.2d 22 (3rd Cir. 1970); *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228 (D.C. Cir. 1981); *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140 (5th Cir. 1984). Additionally, none of the plaintiffs in *Blaski* or the circuit court cases cited by the Wilds ever claimed that venue and/or jurisdiction was in fact proper in the transferee court.

The Wilds have waived their current arguments as they did not raise them in a timely manner. They could have objected to the transfer in the Louisiana district court on the grounds that the moving party (Allstate) had not demonstrated that venue and jurisdiction were proper in the transferee court, but they did not. The Wilds could have raised the propriety of the transfer based on lack of jurisdiction over Hillery when the first answer to their amended complaint was filed raising lack of personal jurisdiction as an affirmative defense. Again, they did not. Similarly, instead of arguing that jurisdiction did exist in response to Hillery's summary judgment motion, the Wilds could have asked the court to stop the proceedings so that they could challenge the transfer based on Hillery's claim of no jurisdiction. The Wilds didn't do any of these things

and now wish to turn back the hands of time to revive their dead claims. The Wilds knew, or certainly should have known, that the rule in the Seventh Circuit was that objections to transfers based on venue and/or jurisdiction grounds are waived if not timely pursued. *National Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989). Under these circumstances, the Wilds clearly waived any right to challenge the transfer on the grounds that the court lacked personal jurisdiction over one of 13 defendants.

These respondents further adopt herein as though more fully set forth all other briefs filed by the other respondents, and the arguments raised therein in opposition to the Wilds' petition.

CONCLUSION

In conclusion, the Seventh Circuit's decision is quite narrow and limited to the unique facts presented by this case. The facts of this case, and particularly the Wilds' waiver of their challenge to the propriety of the transfer, are distinguishable from *Blaski* and the circuit court cases cited by the Wilds in their petition. These respondents respectfully request that the Wilds' petition be denied.

Respectfully submitted,

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No. 02-316

IN THE

Supreme Court of the United States

DONALD R. WILD and DIANA H. WILD,

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC.; Y.E.S.! INC. a/k/a YOUTH EMPLOYMENT SERVICES, INC.; KARLEEN HILLERY; CHOAN LANE; JEREMY HOLMES; HEART OF TEXAS DODGE, INC.; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANY; PROGRESSIVE NORTHERN INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; UNIVERSAL UNDERWRITERS INSURANCE COMPANY AND MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SUBSCRIPTIONS PLUS, INC. AND KARLEEN HILLERY

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STATEMENT PURSUANT TO RULE 29.6

Respondent Subscriptions Plus, Inc. (SPI), has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 101.90 (3d ed. 2001) 4

STATEMENT OF THE CASE

Petitioners Donald and Diana Wilds' Statement of the Case is incomplete. SPI and Hillery thus add the following facts and procedural history relevant to consideration of the Wilds' Petition.

Defendant/Respondent Allstate moved, among other things, to transfer this case from the Eastern District Court of Louisiana to the Western District of Wisconsin under 28 U.S.C. § 1406(a) on the grounds that the matter was not properly venued in the Louisiana district. (R. 1.) The Wilds' limited their opposition to the motion to arguments that venue was proper in that court and Allstate had not met its burden to show that there was good reason to transfer the case to Wisconsin. (R. 1.) The Louisiana district court held that venue was not proper in the Louisiana court, that it was in the interests of justice to transfer the matter and that the matter would therefore be transferred. (R. 1.)

After the matter was transferred to the Western District of Wisconsin, the Wisconsin district court granted the Wilds' motion to amend their complaint. (R. 16, 18.) The amended complaint included new allegations that venue was proper in the Western District of Wisconsin and that the court had personal jurisdiction over each of the defendants, including Karleen Hillery. (R. 19, ¶¶ 2-15.) On June 2, 2000, defendant Acceptance Insurance Company filed an answer to the amended complaint specifically alleging as an affirmative defense that the Wisconsin district court lacked personal jurisdiction over Hillery. (R. 33, p. 6.) Hillery's answer raised the same affirmative defense. (R. 38, p. 7.)

Hillery later moved for summary judgment on the ground that the Wisconsin district court did not have jurisdiction over her person. (R. 67, p. 2-3.) The Wilds opposed the motion, arguing that the Wisconsin district court did have jurisdiction over Hillery. (R. 116.) On December 6, 2000, the Wisconsin district court granted Hillery's motion. The court also granted summary judgment against the Wilds on virtually every single claim pending against the remaining defendants. (R.166; Petition Appendix ("Pet. App.") at 51a-52a.) It was only then — having all but lost — that the Wilds first claimed that lack of jurisdiction over Hillery may raise an issue as to whether the case had been properly transferred. (R. 201, pp. 3-4.) In a motion to transfer the case back to Louisiana, the Wilds argued that a retransfer was required by the Wisconsin district court's lack of jurisdiction over one of 13 defendants, even though virtually all of their claims had at that point already been dismissed on the merits. (*Id.* at pp. 3-4, 16-17.)

The Wilds lost their motion to retransfer and appealed. (R. 298.) During the pendency of the appeal, a Wisconsin state circuit court adjudicating claims of other victims of the van crash at issue in this case held that Wisconsin courts *did* have personal jurisdiction over Hillery under Wisconsin's long-arm statute. (Pet. App. at 6a-7a.) The Seventh Circuit, noting this decision, held that the Wisconsin district court did have jurisdiction over Hillery. (Pet. App. at 7a.) Had the district court not done so:

> Hillery would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscriptions Plus [also a defendant], would have gone down the drain with that claim. As it is, the claim against her remains

> alive in the district court [the second action[1]] — if barely, since the defendants have moved to dismiss it as barred by res judicata. Still, the plaintiffs are no worse off, or, in any practical sense, differently situated, than if the district judge had not mistakenly dismissed Hillery, thus raising the retransfer issue.

(Pet. App. 7a.) Recognizing that the case had been correctly dismissed as to all defendants, the Seventh Circuit affirmed. (Pet. App. at 12a.)

REASONS FOR DENYING THE PETITION

I. The Case Is Moot.

In their Petition, the Wilds have not challenged the Seventh Circuit's ruling that jurisdiction exists, meaning that the correctness of that ruling will not be questioned by this Court. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976) (if a ruling of the court below is not challenged in the petition for review, Court will not "pass on the correctness" of that ruling). The Wilds thus have no legally cognizable interest in the outcome of this case because, even if a transfer under § 1406(a) is invalid in some a case where the transferee court does not have personal jurisdiction over one of several defendants, in this case, jurisdiction was not lacking over any of the defendants. *See Powell v. McCormack*, 395 U.S. 486,

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1. The "second action" is the consolidated action consisting of two suits the Wilds brought against Hillery and the other defendants in Louisiana courts after the Wisconsin district court dismissed the Wilds' claims in the first action. (Pet. App. at 6a.) The second action stemmed from the same accident at issue in this case. The Louisiana court transferred the second action to the Wisconsin district court, where Hillery moved to dismiss on claim preclusion grounds. (*Id.*)

496 (1969) ("A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."); 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 101.90 (3d ed. 2001) (issue is moot if relief requested by judicial review would no longer serve any purpose). The Wilds' Petition should be denied.

II. THE SEVENTH CIRCUIT'S DECISION IS PROPER AND DOES NOT CONFLICT WITH ANY DECISION FROM THIS COURT OR ANY OTHER CIRCUIT COURTS.

The issue here, as the Wilds see it, is whether a transfer under § 1406(a) is invalid even though venue is proper in the transferee court as to all defendants, but one of the defendants is not subject to personal jurisdiction in the transferee court. (*See* Petition at 11.) The Seventh Circuit held that a transfer under those circumstances is entirely proper. (Pet. App. at 8a-10a, 12a.) The Wilds claim that this decision conflicts with this Court's decision in *Hoffman v. Blaski*, 363 U.S. 335 (1960) and with the decisions of other circuits. (*See* Petition at pp. 7-10 and cases cited therein.)

The Wilds are mistaken. *Blaski* and the circuit court cases the Wilds cite in their Petition differ factually from the present case in critically important respects and thus properly played no role in the Seventh Circuit's decision. The result in this case is not in conflict with the decisions of this Court, or the decisions of other circuits.

In the present case, it is undisputed that venue was proper in the Wisconsin district court as to all 13 defendants.[2] It has

2. Venue in the Western District of Wisconsin was premised on 28 U.S.C. § 1391(a) on the ground that a substantial part of the (Cont'd)

also never been disputed that the Wisconsin district court had personal jurisdiction over 12 of the 13 defendants. (R. 19, ¶¶ 2-15; R. 33, p. 6; R. 38, p. 7.) The parties hotly disputed whether Hillery was subject to personal jurisdiction in the Wisconsin district court. The Wilds (the *plaintiffs* in this case) took the position that the Wisconsin district court did have jurisdiction over Hillery — at least up until the time that the Wisconsin district court dismissed most of their claims.[3] (R. 19, ¶¶ 2-15; R. 116.)

Moreover, the Wisconsin district court's decision on whether Hillery was subject to personal jurisdiction in Wisconsin courts was not the last word on the issue. Months after that decision, a Wisconsin state court, addressing the identical personal jurisdiction issue in a proceeding arising from the identical van crash against the identical defendants,

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(Cont'd)
events or omissions giving rise to the claim occurred within the Western District. The Wisconsin district court so ruled (R. 211; Pet. App. at 18a), and the Seventh Circuit affirmed (Pet. App. at 6a, 12a.) The Wilds do not contest that determination in their Petition.

3. The Wilds complain in their Petition that the Wisconsin court "erroneously" placed on them the burden of establishing jurisdiction in response to Hillery's summary judgment motion because, they argue, a defendant moving for transfer under 28 U.S.C. § 1406(a) bears the burden of proving that the transferee court has jurisdiction over that defendant. (Petition at 2.) The Wilds' complaint has no merit. Hillery never sought a transfer under § 1406(a) (defendant Allstate brought that motion). (R. 1.) She did seek dismissal of the Wilds' claims based on lack of jurisdiction. (R. 68.) When a defendant challenges a court's jurisdiction over her person, it is the plaintiff's burden to establish that jurisdiction is proper. *Steel Warehouse of Wisconsin v. Leach*, 154 F.3d 712, 714 (7th Cir. 1998). The Wisconsin court thus correctly applied the law applicable to the situation before it.

disagreed with the Wisconsin district court and held that Wisconsin courts *did* have jurisdiction over Hillery under Wisconsin's long-arm statute.

Based on these very specific facts, the Seventh Circuit explained that even if the district court had lacked jurisdiction over Hillery (the court had already held that the district court *did* have jurisdiction), the lack of jurisdiction over one of 13 defendants would not have entitled the Wilds to a "retransfer" back to Louisiana. (Pet. App. 8a-10a, 12a.) True, the court did not address *Blaski*. But, there was no need to because *Blaski* did not address the very narrow issue that would have been before the Seventh Circuit had jurisdiction in fact been lacking over Hillery: whether lack of jurisdiction over one of 13 defendants where venue was proper as to all defendants required retransfer. 363 U.S. at 336-39, 344. Rather, *Blaski* addressed the (comparatively) straightforward issue of whether an action can be transferred to a district where neither venue nor jurisdiction are proper as to *any* defendant. *Id.*; *Van Dusen v. Barrack*, 376 U.S. 612, 620 (1964) (*Blaski* "held that, despite the defendant's waivers or consent, a forum which had been improper for *both* venue *and* service of process was not a forum where the action 'might have been brought'" for the purposes of § 1404(a)) (emphasis added). The Court held that where both venue and jurisdiction are lacking as to all defendants, the action is not one that "might have been brought" in the transferee court and the action could not be transferred. *Id.* at 344. This just makes sense. In such cases, if the original action had been filed in the transferee court to begin with, the *entire action* would have had to have been dismissed because it could not be maintained against any defendant. That is, there would be no one against whom the case could proceed at all.

In contrast to the situation addressed in *Blaski*, had the action in this case been commenced in the Western District of Wisconsin to begin with, the *action* as a whole would have properly proceeded in that court even though the *claims* against one of the defendants would have been dismissed for lack of jurisdiction. As the Seventh Circuit recognized, the action clearly "could have been brought" in the Wisconsin district court. (Pet. App. at 7a-8a.) In short, *Blaski* does not control here.

This case differs from *Blaski*, as well as from the other circuit court cases on which the Wilds rely in their Petition, in another critical way. None of the plaintiffs in those cases clearly waived an established right to challenge the transfer on the grounds that venue was wrong or that the transferee court lacked jurisdiction over one or more of the defendants. *See Blaski*, 363 U.S. 335; *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509 (10th Cir. 1991); *Shutte v. Armco Steel Corp.*, 431 F.2d 22 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228 (D.C. Cir. 1981); *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140 (5th Cir. 1984), *overruled on other grounds by In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987). Indeed, each plaintiff in those cases consistently asserted at the earliest point possible that venue was improper in the transferee court and/or that court did not have personal jurisdiction over all defendants.

Standing in sharp contrast to *Blaski* and the circuit court cases the Wilds cite in their Petition, the Wilds did *not* immediately object to and clearly waived any claim that the transfer was improper on personal jurisdiction grounds by failing to timely press the issue. The Wilds certainly had ample opportunity to raise the issue before they lost most of their case

on the merits. They could have objected to the transfer in the Louisiana district court on the grounds that the moving party — Allstate — had not demonstrated that venue and personal jurisdiction were proper in the transferee court as to all defendants. But they did not. (R. 1.)

They could have questioned the propriety of the transfer on personal jurisdiction grounds when the first answer to their amended complaint was filed specifically alleging lack of personal jurisdiction as to Hillery. Similarly, instead of arguing that the Wisconsin district court did have personal jurisdiction over Hillery in response to Hillery's summary judgment motion, (R. 116), the Wilds could have asked the court to stop the proceedings so that they could challenge the transfer based on Hillery's claim of lack of personal jurisdiction. The Wilds didn't do any of these things. They sat on their rights until after they lost, bringing the transfer motion as part of a transparent ploy to try their luck in some other court. They failed to promptly raise this issue even though it has long been the law in the Seventh Circuit that objections to transfers based on venue and/or personal jurisdiction grounds are waived if not timely pursued. *See National-Standard Co. v. Adamkus*, 881 F.2d 352, 356 (7th Cir. 1989). Under these circumstances, the Wilds clearly waived any right to challenge the transfer on the grounds that the court lacked jurisdiction over the person of one of 13 defendants.

CONCLUSION

As explained above, this case is moot. In any event, the Seventh Circuit's decision is quite narrow, limited to the unique facts presented by this case. These facts, particularly the Wilds' waiver of any objection to the transferee court proceeding even though jurisdiction over one defendant was uncertain, were not present in *Blaski*, nor in any other circuit court decision mentioned by the Wilds in their Petition. There are basis for granting the Wilds' Petition and it therefore should be denied.

Respectfully submitted,

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(5)

Supreme Court, U.S.
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No. 02-316

IN THE

Supreme Court of the United States

DONALD R. WILD and DIANA H. WILD,

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC.; Y.E.S.! INC. a/k/a YOUTH EMPLOYMENT SERVICES, INC.; KARLEEN HILLERY; CHOAN LANE; JEREMY HOLMES; HEART OF TEXAS DODGE, INC.; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANY; PROGRESSIVE NORTHERN INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; UNIVERSAL UNDERWRITERS INSURANCE COMPANY and MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Whether 28 U.S.C. § 1406(a) allows the transfer of a case to a transferee court that does *not* have personal jurisdiction over *all* defendants.

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ARGUMENT

I. THE CASE IS NOT MOOT

Respondents argue that this case is moot because petitioners "have not challenged the Seventh Circuit's ruling that jurisdiction exists" and therefore it has been established that "jurisdiction was *not* lacking over *any* of the defendants." (Brief in Opposition for Respondents SPI and Hillery ("Hillery's Opp. Brief") at p. 3; emphasis added).

In other words, SPI and Hillery *now* argue that Hillery *is* subject to the district court's jurisdiction notwithstanding Hillery's request for dismissal (which started this controversy) *and* her inability to appeal the *favorable* ruling she obtained. They go on to state:

> True, the court did not address *Blaski*. But, there was no need to because *Blaski* did not address the very narrow issue that *would* have been before the Seventh Circuit *had jurisdiction in fact been lacking* over Hillery: whether lack of jurisdiction over one of 13 defendants where venue was proper as to all defendants required retransfer.

(Hillery's Opp. Brief at p. 6; emphasis added).

Likewise, Acceptance Insurance Companies, Scottsdale Insurance Company and Progressive Northern Insurance Company incorrectly argue that "[t]he court of appeals determined that the district court had erred in finding no jurisdiction over Hillery." (Brief in Opposition for respondents Acceptance Insurance Companies, Scottsdale Insurance Company and Progressive Northern Insurance Company ("Insurers' Opp. Brief") at p. 3). Respondents are wrong for several reasons.

First, petitioners have *always* argued that "the Wisconsin court never acquired jurisdiction because one defendant, Hillery, is not amenable to process in Wisconsin." (Pet. at p. 11).

Second, the Seventh Circuit did not "rul[e] that jurisdiction [over Hillery] exists . . ." and it did not "determine[] that the district court had erred in finding jurisdiction over Hillery" as claimed by respondents. (Hillery's Opp. Brief at p. 3; Insurers' Opp. Brief at p. 3). In fact, *none* of the respondents appealed to the Seventh Circuit the district court's finding that it lacked jurisdiction over Hillery. What Hillery *did* was that she tried to cure the jurisdictional problem by telling the Seventh Circuit at the appellate stage that she was willing to *submit* to the Seventh Circuit's and the district court's jurisdiction.

In their original appeal brief petitioners asked the Seventh Circuit to decide as a threshold issue whether the district court had acquired jurisdiction over this case. Petitioners argued that the district court *never* acquired jurisdiction over the case because the court had determined that Hillery was not subject to its jurisdiction and, once the district court made that determination, it could proceed no further. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Ex Parte McCardle*, 7 Wall. 506 (1868) (". . . when [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"); *Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir. 1998) ("It is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take any action respecting the merits of the action").

In their response brief, respondents did *not* rebut that argument. Instead, SPI and Hillery *only* claimed that this *jurisdictional* deficiency could be *cured ex post facto* by Hillery's willingness, expressed for the first time in her appeal brief, to submit to the jurisdiction of the appeals and district courts.

Petitioners responded by pointing out that the argument made by SPI and Hillery, that a court's jurisdiction over a case can be made to depend upon a party's *consent* to jurisdiction, had been flatly rejected by the Seventh Circuit and this Court in *Blaski v. Hoffman*, 260 F.2d 317 (7th Cir. 1959), *aff'd*, 363 U.S. 335 (1960). *See also Page v. Wright*, 116 F.2d 449 (7th Cir. 1940); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, §§ 1393, 3844 (2d ed. 1986) (hereinafter cited as "Wright & Miller").

It was *not* surprising that Hillery, after having successfully challenged the district court's jurisdiction over her (and thereby the court's jurisdiction over the case) was *then*, at the appellate level, willing to submit to the court's jurisdiction, since she now knew the district court would also rule in her favor if given a chance. (Pet. App. 36a).

It *was* surprising, however, that Hillery had challenged the district court's jurisdiction in the first place. Hillery has never explained why she did it, or whether she (or her lawyers for that matter) knew that her challenge to the court's jurisdiction over *her* also amounted to a challenge to the jurisdiction over the *entire case*. Regardless of whether she knew that or not—and regardless of whether she filed her jurisdictional challenge to hedge her position just in case the district court ruled against her on the merits of the case- -the net effect of the district court's ruling (which was not challenged by anyone on appeal) was that petitioners were prevented from suing Hillery in the Wisconsin district court. The obvious implication of Hillery's challenge, and of the court's ruling, was a recognition that the district court—as a transferee court—had *never* acquired jurisdiction over the case.

Since Hillery prevailed in her jurisdictional challenge and *established* that the district court *did not have jurisdiction* over

her, at the appellate level she could not—and did not—argue that she was wrongfully dismissed from the case. Instead, still wanting to preserve the favorable ruling SPI (her company) obtained on the merits, she decided to *manufacture jurisdiction* over the case by a declaration that she was *then* willing to *submit* to the jurisdiction of the appeals and district courts. Hillery apparently believed that *she* could decide when and how a court acquires jurisdiction over a case. Fortunately, this Court had already said "no" to that argument.

But, in any event, it is not accurate, as respondents suggest, that *anyone* appealed to the Seventh Circuit the district court's ruling that it lacked jurisdiction over Hillery. And any suggestion that the Seventh Circuit *reversed* the district court's ruling is equally inaccurate.

The Seventh Circuit's opinion (Pet. App. 1a-12a) shows the Court did *not* reverse the district court on *any* issue. Moreover, a reversal would have required the Court to set aside the judgment dismissing Hillery from the case, and that did not happen.

In sum, the district court's decision finding no jurisdiction over Hillery was not appealed and it is *res judicata*, notwithstanding the contrary decision by the Wisconsin state court—a decision that has not been reviewed yet.

II. RESPONDENTS DID NOT WAIVE THEIR CHALLENGE TO THE DISTRICT COURT'S JURISDICTION

Respondents argue that petitioners waived their challenge to the court's jurisdiction over the case. This is not true. If anyone waived anything, it is the respondents, because *they never* presented their waiver argument to the district court. Moreover, although they raised the "waiver" argument *for the first time* in

the appeals court, obviously they lost it. And they cannot raise the argument in this Court because *they* did not seek certiorari review. If anyone waived anything, it is the respondents.

In any event, the "waiver" argument lacks merit. It is hornbook law that a challenge to a court's jurisdiction over a case is *never* waived and can be raised at any time. *American Fire and Casualty Co. v. Finn*, 341 U.S. 6 (1951) (the absence of jurisdiction *at the time of judgment* required the court of appeals to vacate the district court's judgment); *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 ("... if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated"); *International Union of Operating Engineers v. Rabine*, 161 F.3d 427, 429 (7th Cir. 1998); Fed. R. Civ. P. 12(h)(3); Wright & Miller § 1393.

Moreover, petitioners made their jurisdictional challenge in a timely fashion, at their first opportunity after the district court held that it lacked jurisdiction over Hillery, as required by *National Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989) and *Songbyrd v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000).

True, petitioners did *not* argue to the Louisiana court (before the transfer) that the Wisconsin court lacked jurisdiction over Hillery. Why? Because petitioners had no reason to believe- -and had no evidence to suggest or prove- -that Hillery was not subject to suit there, and because it is the moving party's burden to show that personal jurisdiction can be exercised in the transferee district. 17 *Moore's Federal Practice* § 111.33 (3d). Moreover, as noted by the Seventh Circuit in *National Standard*, "an order of transfer is not *res judicata*." 881 F.2d at 356. Thus, petitioners did not waive anything by not arguing to the Louisiana court that the Wisconsin court lacked jurisdiction over Hillery.

Thereafter, when the suit arrived in Wisconsin, petitioners still had no reason to believe, and no evidence to support or prove, that Hillery was not subject to that court's jurisdiction. And later, when Hillery filed her motion seeking dismissal for lack of personal jurisdiction- -which was actually a motion for summary judgment filed only three months before the scheduled trial date—petitioners still believed the court had jurisdiction over Hillery. In fact, petitioners filed papers opposing Hillery's motion. In the end, Hillery won and petitioners lost the jurisdictional dispute.

Once the district court issued its Opinion and Order on December 6, 2000 (Pet. App. 20a-52a) petitioners filed a motion for reconsideration. Their motion for reconsideration was still in the court's hands when, on January 5, 2001, petitioners filed their motion for retransfer, at their first opportunity after learning that Hillery was not subject to the court's jurisdiction and after respondents failed to ask for modification of that order. The district court denied the motion for reconsideration on January 8, 2001 and denied the motion for retransfer two days later, on January 10, 2001 (Pet. App. 16a-19a). Petitioners' request for retransfer was certainly timely.

In *In Re Cragar Industries, Inc.*, 706 F.2d 503, 505 (5th Cir. 1983), the Fifth Circuit held that a party may move to retransfer a case "when unanticipatable post-transfer events frustrate the original purpose of the transfer . . ." In our case, Hillery waited until less than four months before trial to challenge the court's jurisdiction over her (and thereby the court's jurisdiction over the case). Petitioners tried to oppose her motion, but the court ruled that Hillery could not be sued in Wisconsin. In light of these changes in circumstances—which were brought about by no one other than Hillery, and which frustrated the original purpose of transfer—petitioners motion to retransfer was filed timely.

Respondents' reliance on *National Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989) is misplaced. That case supports petitioners' position and not the respondents' arguments:

> . . . We hold that EPA has waived this issue. A thorough review of the record reveals no attempt by EPA or its coappellees to object to the transfer when it was made. *Never once* in all its pleadings or briefs before the various courts in this case did EPA ever question the validity of the transfer from Michigan to Illinois. The EPA did not seek review of the transfer order in the Sixth Circuit. *See Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc.*, 436 F.2d 1180, 1187-88 (7th Cir.), *cert. dismissed*, 403 U.S. 942, 91 S.Ct. 2270, 29 L.Ed.2d 722 (1971); *Purex Corp. v. St. Louis Nat'l Stockyards Co.*, 374 F.2d 998, 1000 (7th Cir.), *cert. denied*, 389 U.S. 824, 88 S.Ct. 59, 19 L.Ed.2d 77 (1967); *see also Roofing & Sheet Metal Services, Inc. v. La. Quinta Motor Inns, Inc.*, 689 F.2d 982, 985-87 (11th Cir. 1982). *Nor did it move for retransfer of the matter in the district court* for the Northern District of Illinois. *See Purex*, 374 F.2d at 1000; *Linnell v. Sloan*, 636 F.2d 65, 67 (4th Cir. 1980); *see generally* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3846 at 359-60 (1986) ("The transfer order is not subject to review by the transferee court or its court of appeals. . . . But an order of transfer is not res judicata. A motion to retransfer the action may be made in the transferee court and the ruling on that motion is reviewable in the court of appeals

> to which the transferee court is responsible.") (footnotes omitted). Consequently, we shall not allow this afterthought to be argued before us now.

881 F.2d 356 (Emphasis added).

Our case is nothing like *National Standard.* In *National Standard*, the appellant "never once" questioned the validity of the transfer, "did [not] move for retransfer of the matter in the district court," and raised the issue of the transfer's propriety for the first time during oral argument on appeal. In our case, however, petitioners filed papers in Louisiana objecting to the transfer; objected to Hillery's motion to dismiss for lack of personal jurisdiction; and then moved to *retransfer* the case as soon as the district court determined that it lacked jurisdiction over Hillery. It is clear the petitioners *never* waived their challenge to the court's jurisdiction over the case.

Respondents' reliance on *Moro v. Shell Oil Company*, 91 F.3d 872 (7th Cir. 1996) and *Krueger International, Inc. v. Blank*, 225 F.3d 806 (7th Cir. 2000) is also wrong.

Moro v. Shell Oil Company involved the court's *denial* of a motion under Fed. R. Civ. P. 59(e) to alter or amend a judgment, made *after* the judgment was entered. The motion was denied because the "new" evidence offered by the plaintiff in support of the motion had been available to him before the judgment was entered.

Likewise, *Krueger International, Inc. v. Blank* is not applicable. In that case the plaintiff filed a motion under Fed. R. Civ. P. 59(e) after the judgment was entered and raised a new theory of the case. The Seventh Circuit, relying on *Moro v. Shell Oil Company*, held that the issued had been waived.

CONCLUSION

The real issue presented by this case is whether 28 U.S.C. § 1406(a) allows the transfer of a case to a transferee court that lacks personal jurisdiction over *all* defendants. This issue is of important concern to the effective administration of justice in the federal courts.

The Seventh Circuit's decision conflicts with a controlling decision of this Court and with decisions of three other circuit courts. This conflict is apt to have continuing future consequences and the Court should take this opportunity to resolve the conflict on this very important issue.

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